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1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 CASE NO. 08-13555-scc

4 - x

5 In the Matter of:

6

7 LEHMAN BROTHERS HOLDINGS, INC.,  
8 ET AL,

9

10 Debtors.

11 - x

12

13 U.S. Bankruptcy Court  
14 One Bowling Green  
15 New York, New York

16

17 April 3, 2014

18 10:17 AM

19

20 B E F O R E :

21 HON. SHELLY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

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25 ECRO - F. FERGUSON

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1 HEARING Re Evidentiary Hearing on RSU Claims

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1 P R O C E E D I N G S

2 MR. MILLER: Good morning, Your Honor, Ralph

3 Miller --

4 THE COURT: Good morning.

5 MR. MILLER: -- here for LBHI again. We have had

6 discussions about exhibits, Your Honor, and I think we have

7 a general agreement on what we believe should be admitted.

8 Would the Court like for us to try to read some numbers into  
9 the record?

10 The only issue that I'm not certain about is at  
11 one point I was told that there was a proposal to admit some  
12 exhibits that were not referred to at all. I believe that  
13 maybe we have narrowed that, and if they are -- have those  
14 been eliminated, or have we resolved those? I think some of  
15 them may be -- if there are other versions of things that  
16 were discussed like other copies of a retention agreement --

17 THE COURT: Right.

18 MR. MILLER: -- or something, we don't object to  
19 that.

20 THE COURT: Okay.

21 MR. MILLER: If there are other examples of  
22 program documents, we don't object to that, but if they are  
23 -- there also may be a little issue about deposition  
24 designations, because we had a designation process, and we  
25 don't think undesignated portions should come in, because we

1 have not had optional completeness on those.

2 THE COURT: Okay. Yes.

3 MR. GOLDENBERG: Your Honor, Andrew Goldenberg for  
4 the claimants. Our position is we'd like to include all the  
5 exhibits that were marked in the claimant's exhibit list,  
6 which include declarations and program documents referred to  
7 in the briefs, but may not have been referred to.

8 THE COURT: Right off the bat, I'm not following  
9 you. What does it mean to say that all of the exhibits that  
10 were marked in what?

11 MR. GOLDENBERG: The claimant's -- as per the  
12 stipulation of the procedures order, we submitted an exhibit  
13 list with exhibits marked CLX 1 through eighty --

14 THE COURT: So it's not an exhibit list. You're  
15 just saying that -- I mean, we're back to where we were two  
16 days ago. You're just saying that every single document  
17 that is in this book you want admitted into the record,  
18 that's what you're saying?

19 MR. GOLDENBERG: I'm saying every single document  
20 that we referred to in our briefs or at this hearing, we'd  
21 like in the record.

22 THE COURT: That's a different statement than the  
23 one that you started with. The one that you started with  
24 was, every single document that you put on the list pursuant  
25 to the stipulation, which is every single document in these

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1       binders. I do not know if you've referred to every single  
2       one of them, so which is it that you want to do?

3                   MR. GOLDENBERG: We have referred to every single  
4       one of them in our exhibit list in either the briefs or at  
5       this hearing, so we'd like to enter in all those documents  
6       into evidence.

7                   THE COURT: So you think that you've referred to  
8       documents CLX001 through CLX0086?

9                   MR. GOLDENBERG: I believe so, Your Honor. There  
10       are declarations and program documents that have been cited  
11       in our briefs, and have been filed with the Court.

12                  THE COURT: Okay. I --

13                  MR. MILLER: Well, Your Honor, I don't think we  
14       believe that merely citing an exhibit in a brief is  
15       sufficient for us to know that they are introduced.

16                  As I say, if they were referred to in the  
17       testimony or presented in the argument or they are merely  
18       another exemplar of something that was presented to the  
19       Court, we don't have a problem, but there is a lot of stuff  
20       in there, and if they haven't given us a specific list just  
21       to say all of them, we don't believe is in the spirit of  
22       what was discussed with the Court at the beginning of this  
23       process.

24                  MR. GOLDENBERG: Your Honor, the specific list  
25       that Mr. Miller's referring to has been submitted. It

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1 includes CLX 1 through I believe 86 or 87, and there are  
2 three other documents in addition to that, that was  
3 introduced at the hearing. They were Mr. Howard's  
4 declaration, and his proof of claim, as well as Mr. Michael  
5 Gran's proof of claim, and designated portions of --

6 THE COURT: Well, you know, here -- I mean, the  
7 problem is that, you know, just paging through this, there's  
8 a hearing transcript, you know, there's a 10K, there's --

9 MR. GOLDENBERG: Your Honor, we just want the  
10 record to be inclusive and --

11 THE COURT: I understand that you want the record  
12 to be inclusive, but two days ago, I explained to you that  
13 the problem that there is, is that it is impossible, it is  
14 just literally impossible for me to read every single one of  
15 these pages. So to the extent that you specifically want to  
16 develop an argument related to them, you needed to point  
17 them out. And now all you're doing is saying, there they  
18 are, there are the two volumes.

19 So I'm telling you once again that simply, you  
20 know, in all of these declarations or most of them, which  
21 were written by lawyers, and are not the words of the  
22 claimants, if you refer to all of these things, that's fine.  
23 But it's not going to happen that I'm going to read every  
24 single one of these pages.

25 So, Mr. Miller, I'm sorry, but you know, if

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1 there's an appeal after this decision, and they determine to  
2 fish something out of these documents --

3 MR. MILLER: Well --

4 THE COURT: -- you're just going to have to deal  
5 with it at the time I guess.

6 MR. MILLER: Well, Your Honor, we are not agreeing  
7 that they should put in these things that were not referred  
8 to in the testimony or the category was not discussed in the  
9 testimony or in their opening.

10 What we're saying is, is that it should be  
11 limited, and I think we have some understanding of the ones  
12 that we would object to, and maybe can we talk about those  
13 categories?

14 MS. ALVAREZ: Sure. I mean, off the top of my  
15 head, I can give you an example --

16 THE COURT: Would you please? That would be  
17 helpful.

18 MS. ALVAREZ: The 30(b)(6) deposition transcript  
19 (indiscernible - away from the microphone) is on the exhibit  
20 list. We've each (indiscernible) specifically designated  
21 certain portions of that transcript, and while the entire  
22 transcript is on the exhibit list to be admitted.

23 MR. GOLDENBERG: Your Honor, we would be happy to  
24 exclude the entire transcript --

25 THE COURT: But you --

1                   MR. GOLDENBERG: -- and there are designated  
2 portions that we've included as an exhibit --

3                   THE COURT: But there's the point.

4                   MR. GOLDENBERG: -- but -- yeah.

5                   THE COURT: That's the point.

6                   MR. GOLDENBERG: Yeah.

7                   THE COURT: So now what should've been done before  
8 is going to have to be done now. So off the top, we have an  
9 example where your response is, never mind, I don't really  
10 want that whole exhibit admitted, I just want the  
11 designations.

12                  So that's the point that Mr. Miller is making is  
13 that to go through these one-by-one-by-one, that was what  
14 you were supposed to have done before we started here today,  
15 and I'm not going to do it now. We allocated two hours and  
16 15 minutes to have an argument, so once again, there's just  
17 a complete breakdown of a normal procedure the way a trial  
18 is conducted.

19                  MR. MILLER: And, Your Honor, I would note we had  
20 proposed by e-mail, and it was late last night that we'd try  
21 to meet here 15 minutes before, and we were here, and nobody  
22 came. And there was no discussion before 10 o'clock on --  
23 maybe that's not --

24                  MR. GOLDENBERG: That's not accurate. I had a  
25 discussion with Teresa Brady and the claimants agreed to

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1 allow all the exhibits that Lehman wants to submit into  
2 evidence, to allow them to submit it. There was no  
3 objection to any of the documents they want in the record.

4 THE COURT: But Lehman's exhibit list is a narrow  
5 list.

6 MR. MILLER: Okay.

7 THE COURT: It's a --

8 MR. GOLDENBERG: It is, Your Honor.

9 THE COURT: Okay. But you made no attempt to --

10 MR. GOLDENBERG: We would be happy --

11 THE COURT: -- come up with a --

12 MR. GOLDENBERG: -- to make a -- we can only -- if  
13 you want a limited list, we'd be happy to submit a limited  
14 list of only documents that referred to -- that were  
15 referred to at the hearing.

16 MR. MILLER: Could --

17 THE COURT: Well, you're going to have to do it  
18 after today, and then you're going to have to submit it as  
19 part of post-trial. You can send a letter, or you can file  
20 a pleading.

21 MR. GOLDENBERG: If you prefer, we could file the  
22 list today, Your Honor, just limiting the documents --

23 THE COURT: Well, that's fine but you --

24 MR. GOLDENBERG: -- after we've agreed with --

25 THE COURT: Well --

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1 MR. MILLER: Is there any chance we could work on  
2 this maybe during the day a little bit, Your Honor, and see  
3 if at the end of the arguments, we could come back to this  
4 issue?

5 THE COURT: I wanted it to be done even before the  
6 argument.

7 MR. MILLER: Yes, we understand, Your Honor.

8 THE COURT: I -- you know, I mean, every day  
9 there's just a new unpleasant surprise here. Mr. Kaplan?

10 MR. KAPLAN: Your Honor, with respect to the  
11 Neuberger list --

12 THE COURT: Yes.

13 MR. KAPLAN: -- we've agreed that Exhibits A  
14 through O would be admitted as part of the record with the  
15 agreement that we will substitute unredacted N and O for the  
16 redacted ones.

17 THE COURT: Okay.

18 MR. KAPLAN: I had been requested by Neuberger to  
19 redact them initially, but since there's been some issue --

20 THE COURT: Okay.

21 MR. KAPLAN: -- I will hand Your Honor these --

22 THE COURT: Mr. --

23 MR. KAPLAN: -- and there's no proprietary or --

24 THE COURT: Okay.

25 MR. KAPLAN: -- ethical information, it's all

1 benefits.

2 THE COURT: Okay. All right. So, Mr. Miller, is  
3 that -- or Ms. Alvarez, is that all right with you folks?

4 MS. ALVAREZ: Yes.

5 THE COURT: Okay. All right. So that takes care  
6 of Neuberger, and the other represented claimants, I don't  
7 know how you want to handle this, if you want to --

8 MR. GOLDENBERG: I can consult with --

9 THE COURT: Ms. Alvarez.

10 MR. GOLDENBERG: -- counsel, Ms. Alvarez or Ms.  
11 Brady --

12 THE COURT: Okay.

13 MR. GOLDENBERG: -- and I can take care of this  
14 before the end of today.

15 THE COURT: Okay.

16 MR. MILLER: If we can do that, Your Honor, then  
17 we'll sort of all know what we're working with.

18 THE COURT: I agree.

19 MR. MILLER: That was our hope to do sooner as  
20 well, Your Honor.

21 THE COURT: I agree. Okay. All right. So let's  
22 note the time, let's call it 10:30. So I think, Mr. Miller,  
23 we had agreed that you were going to take 50 minutes, right,  
24 and reserve 10 for rebuttal net of my taking up a lot of  
25 band width, which I'm probably too tired to do, so it's your

1 lucky day.

2 MR. MILLER: Well, Your Honor, I'm not sure it's  
3 my lucky day. I'd love to have dialogue with the Court.

4 THE COURT: Okay.

5 MR. MILLER: Shall I begin?

6 THE COURT: Yes, please.

7 MR. MILLER: All right. May it please the Court.

8 All of the evidence presented over the last two  
9 days has clarified some details of the Lehman equity awards  
10 programs. None of that evidence has conflicted with the  
11 undisputed facts and the stipulation that's marked as CL0001  
12 or its exhibits. And all the facts in the record still lead  
13 to the inescapable conclusion that the claims before this  
14 Court must be classified under the LBHI plan as equity.

15 That's because the stock units and stock awards  
16 that give rise to these claims are themselves "equity  
17 securities" under the definition in Section 101.16, or  
18 alternatively, the claims all arise from the purchase of  
19 common stock in the debtor in ways that would require  
20 subordination under Section 510(b).

21 Now, there are four topics that Ms. Alvarez and I  
22 hope to discuss with the Court in the allotted time. And,  
23 of course, we welcome all questions about anything Your  
24 Honor wants to address at any time.

25 First, I want to touch briefly on the evidence

1 that shows that the restricted stock units and conditional  
2 stock awards are "shares in a corporation" or constitute a  
3 "similar security" under Section 101.16(a).

4 Second, I want to talk about the claims that are  
5 being asserted here, what is the legal theory. As now  
6 characterized by the arguments of the claimants and their  
7 lawyers, and as we understand them at this point, and that  
8 has been a shifting landscape, and the way those claims all  
9 lead back to Section 510(b).

10 Third, my colleague, Ms. Alvarez, is going to talk  
11 about the Wage Act claims, and finally, sort of as a follow-  
12 up, I plan to address some legal theories that the claimants  
13 have offered to try to escape from the ruling of Judge  
14 Gonzalez in the Enron case or the words of the Bankruptcy  
15 Code, and also talk about some open issues that the Courts  
16 or claimants have raised to try to be complete, sort of a  
17 mop-up at the very end.

18 So starting with shares in a corporation, let me  
19 turn to the definition of equity security, which the Court  
20 recalls we had in tab 1 of the opening notebook. And  
21 subsection A refers to a share in the corporation, whether  
22 or not transferrable or denominated "stock" or similar  
23 security.

24 The evidence has indeed shown that stock units and  
25 stock awards were not transferrable, but the statute says

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1 whether or not transferrable. So the restriction on  
2 transfer cannot, under the plain words of the statute,  
3 remove the stock units or stock awards from the definition  
4 of equity security.

5 That section also says they don't have to be  
6 denominated as stock. Of course, the word stock is used in  
7 both names. They could also qualify if the Courts finds --  
8 if the Court finds that they are similar securities to  
9 shares in a corporation.

10 Now, if these stock units and stock awards have to  
11 be classified as something, and they do, the evidence has  
12 shown that the best summary comes from Exhibit 3 to the  
13 stipulation, which is the 2003 equity award program. This  
14 was from the first year in issue here. And that program  
15 document states, "you can consider the RSUs as shares of  
16 Lehman Brothers common stock that the firm holds on your  
17 behalf for five years, which you will be entitled to receive  
18 at a time provided at that time, provided you meet certain  
19 terms and conditions."

20 If the RSUs are shares of common stock in LBHI,  
21 that the company holds on behalf of the beneficial owners  
22 for five years, subject to certain terms and conditions, and  
23 then releases as ordinary transferrable common stock, they  
24 must be shares in a corporation.

25 The evidence has shown that they were intended to

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1 give the RSU owners a sense of ownership in the corporation,  
2 what Ms. Krieger called skin in the game. And they, in  
3 fact, did that. That is like common stock. Their value  
4 fluctuated with a value of unrestricted common stock, and  
5 was pegged when they were completely unrestricted and  
6 transferrable at the value of that stock on that day.

7 They received the same dividends as unrestricted  
8 common stock. They had some voting rights, even though not  
9 exactly the same as common stock. There were a very few  
10 circumstances in which they could ever be redeemed for  
11 money. Those were change of control, payment for fractional  
12 shares, or a decision, an election really, of LBHI to pay  
13 dividends in cash, rather than as more shares. None of  
14 those circumstances is before the Court.

15 So under the program documents, all these  
16 claimants were ever entitled to would be common stock. The  
17 stock awards and the stock units matured. They had various  
18 restrictions on them. They were restricted common stock.  
19 Those restrictions dropped away and if the two kinds of  
20 requirements were met, they matured into common stock. They  
21 never matured into anything else.

22 Now, I want to use a couple of shorthands here.  
23 There was a requirement for continuing work, which I call  
24 the tenure requirement, remaining four or five years. And  
25 there were a group of requirements that had to do with not

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1 going to a competitor and -- that had to do with not  
2 engaging in harmful or derogatory activity, I call those the  
3 loyalty requirements. And if the tenure loyalty  
4 requirements were met, the removal of the restrictions or  
5 conditions was automatic. No one had to call, no one had to  
6 ask, no one had to elect, it just happened.

7 And it happened, and at that point it had tax  
8 consequences whether people wanted it or not. At that  
9 point, they had taxable income whether they wanted it or  
10 not. They couldn't say, no, thanks, don't give me stock, I  
11 don't want to pay tax on that this year. There was no  
12 choice. It was automatic. And the only thing they could  
13 ever become was common stock.

14 Now, the claims here are hard to understand, and  
15 this was a comment Judge Gonzalez made in the Enron case.  
16 He said because there are a lot of pro se claimants, it's  
17 really hard to figure out what their claims are. So I'm not  
18 being critical, but that's common.

19 Most of the claim's forms, merely state that the  
20 claimants had stock units or stock awards and now they want  
21 money. What this motion will do is give the claimants  
22 exactly what the agreements in the program documents  
23 promised; equity interest that are precisely the same under  
24 the plan as common stock.

25 I do want to make one thing clear --

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1           THE COURT: But let me stop you on that, because a  
2 couple of the claimants pro se unrepresented seem to be  
3 making the claim that there's an impossibility situation  
4 here.

5           MR. MILLER: I'm glad you raised that, Your Honor.  
6 I do want to make one thing clear that seems to have been a  
7 source of some confusion. The present motion would waive  
8 all of the tenure and loyalty conditions and restrictions  
9 because some people who got RSUs or CSAs in 2007 could work  
10 for five more years.

11          THE COURT: Exactly.

12          MR. MILLER: They couldn't stay away from  
13 competitors --

14          THE COURT: Right.

15          MR. MILLER: -- and they couldn't -- and they  
16 didn't have to --

17          THE COURT: Right.

18          MR. MILLER: -- avoid derogatory comments.

19          THE COURT: Right.

20          MR. MILLER: So they didn't have to meet the  
21 tenure or loyalty requirements.

22          THE COURT: Right. And those claimants are  
23 saying, look, it's -- the bankruptcy rendered the delivery  
24 of the promise impossible.

25          MR. MILLER: But what this motion does is to treat

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1 every RSU or CSA as if it were a share of common stock.  
2 Whether they worked there for five more years or not, in  
3 effect, it does what one set of program documents said would  
4 happen.

5 The program has always said that the conditions  
6 and the restrictions dropped away on death, disability or  
7 retirement. One set of documents also said bankruptcy.  
8 That is the rule that the plan administrator has adopted and  
9 has followed. And for 3,500 other claimants, that rule has  
10 been applied. And regardless of how long they worked and  
11 regardless of what they did or said, if they got a grant of  
12 an RSU or a CSA, they are now on the books and records of  
13 LBHI, the same as if they had shares of common stock at the  
14 time the Chapter 11 was filed.

15 So that is the impossibility issue. And it is  
16 true that if we were saying, well, you know, if this were  
17 American Airlines, for example, and the stock actually had  
18 value, and we said, well, you know, if you work there, we're  
19 going to waive say just the working requirement, but we're  
20 going to check to see if you have loyalty or if you work for  
21 competitors. And they can say, well, I didn't have a  
22 choice. Then we would have this impossibility issue. But  
23 that fact pattern is not before the Court.

24 THE COURT: So then what do you say to Ms. Krieger  
25 who testified that she wanted to be able to sell her RSUS.

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1 So between the time of the filing and you showed her, I  
2 believe it was Ms. Krieger, I think you showed her a  
3 statement that indicated that the value, the market value of  
4 her RSU holdings, as of August -- I'm going from memory, but  
5 as of immediately prior to the filing was \$250 that it was,  
6 I think it was 5 cents was the market rate.

7 So she says during this entire time, I haven't  
8 been able to sell the interest represented by those RSUs.  
9 What do you say to that?

10 MR. MILLER: I say to that, Your Honor, that until  
11 -- if you watched Too Big to Fail which is at least accurate  
12 in part, I'm told, you know that until the Sunday night  
13 before the filing early in the hours of Monday morning,  
14 September 15, nobody knew whether there would be a Chapter  
15 15 or not.

16 THE COURT: A Chapter 11.

17 MR. MILLER: I'm sorry, excuse me, a Chapter 11 --

18 THE COURT: On September 15th.

19 MR. MILLER: -- on September 15th, I'm sorry.

20 THE COURT: Oh, I remember. That was a weekend to  
21 remember.

22 MR. MILLER: And as the Court may know, there was  
23 a trading session that was conducted on that Sunday with a  
24 number of parties, assuming that there was going to be a  
25 Chapter 11 filing that day, and it didn't happen, and all

1 those trades had to be undone.

2 So the whole world was not sure, and frankly, it  
3 teetered on the brink and if what had happened had been what  
4 happened to AIG, then Ms. Krieger's 5 cents might well have  
5 gone up and she might actually -- we might -- any of us not  
6 be here, but that's one of those divisions in the history of  
7 time that could've gone either way.

8 On the 15th of September, the value was virtually  
9 zero. So the delay, which is common, once there's a Chapter  
10 15 as the Court knows it --

11 THE COURT: 11, Chapter 11.

12 MR. MILLER: -- takes a little time to sort out  
13 what's owed. The delay in time has caused no damages. The  
14 delay in time is that she is getting exactly the same  
15 opportunity to deal with those that she would've then. She  
16 couldn't sell them on September 16th or September 15th, and  
17 she can't sell them now, but she still is in the books and  
18 records. She has her number of proportionate units. And as  
19 I said before, if somehow a hidden patent or a great asset  
20 or a derivatives recovery or something pours \$100 billion  
21 into the LBHI estate --

22 THE COURT: So the shares --

23 MR. MILLER: -- and it becomes possible --

24 THE COURT: The plan provides that the shares of  
25 the debtor LBHI are now the shares of the reorganized debtor

1 LBHI?

2 MR. MILLER: My -- this is a little complicated.

3 My understanding is that the way the plan works, all the  
4 shares are treated as part of an equity pool,  
5 proportionately owned, sometimes sort of derogatory, called  
6 the Golden Share. There's essentially one big share --

7 THE COURT: Right, that own --

8 MR. MILLER: -- of the -- that the plan  
9 administrator holds --

10 THE COURT: I got it.

11 MR. MILLER: -- for the benefit of all who have  
12 equity interest, all common stockholders --

13 THE COURT: I got it.

14 MR. MILLER: -- and everybody who's been  
15 reclassified as equity.

16 THE COURT: Okay. But the records keep track of  
17 the proportionate ownership in that share.

18 MR. MILLER: Right. So the 850 shares of that  
19 stock certificate Ms. Krieger had, she's got 850 share  
20 units, if you will, in the Golden Share.

21 THE COURT: I see, okay.

22 MR. MILLER: That's her numerator over the  
23 denominator.

24 THE COURT: Right, okay.

25 MR. MILLER: Now, Lehman Brothers in Europe is

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1 solvent.

2 THE COURT: Right.

3 MR. MILLER: And it's paying -- it's not paying  
4 shareholders yet, but it's, you know, above the solvency  
5 line, and it's still collecting money. It might pay  
6 shareholders.

7 THE COURT: Okay.

8 MR. MILLER: If something like that and it owes  
9 some debts back to LBHI, who knows how all this is going to  
10 play out. I mean, the Enron recovery has gone up and up and  
11 up over the years.

12 THE COURT: Well, also the -- I'm familiar with  
13 the Adelphia recovery. Adelphia is now 12 years out, and I  
14 think Adelphia is over a hundred cent case as well. So, you  
15 know, I understand your point.

16 MR. MILLER: Well, so all of those rights are  
17 preserved.

18 THE COURT: Okay.

19 MR. MILLER: And full performance is still  
20 possible. Nobody has been prevented by impossibility in  
21 terms of being able to claim this if it turns out that  
22 there's some value. The impossibility is that the market  
23 doesn't give any value to those shares, so there's no way to  
24 make them practically marketable, and there's no way to  
25 trade them yet. But it's certainly possible that the plan

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1 administrator, in theory, and I'm getting a little off the  
2 reservation, a little off the tracks here, but you know, I  
3 believe it's possible that if there certainly were value,  
4 there'd have to be some way to distribute that, if I ask my  
5 bankruptcy partner on that, if that's true.

6 THE COURT: Yes, Mr. Lemons.

7 MR. LEMONS: Robert Lemons for the record. Yes,  
8 Your Honor, if in the unlikely event that there turns out to  
9 be surplus value after repaying all the creditors, the money  
10 (indiscernible - away from microphone) to the estate, or you  
11 know, pay the creditors more than a hundred cents plus their  
12 interest entitlements, it would go to the equity, of course.

13 THE COURT: Okay. All right.

14 MR. MILLER: So, in other words, this motion  
15 produces complete performance by LBHI of all the promises in  
16 the program, and it does not rely on any impossibility or  
17 anything that the claimant should have done as a reason to  
18 reduce their rights.

19 So -- and that is perhaps why 3,500 other  
20 claimants have just chosen not to oppose, and by the way,  
21 this reclassification process happened for them much  
22 earlier. The reason it happened so late for this group is  
23 because they wanted discovery, and they wanted this long  
24 procedure.

25 So this delay is not really the wish of the plan

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1 administrator. In fact, the plan administrator would like  
2 to reduce reserves, because as they are reclassified as  
3 equity, it frees up reserves.

4 So under this analysis, the restricted stock  
5 units, and conditional stock awards were always shares in  
6 LBHI. They did have some restrictions and conditions  
7 attached, but there are all kinds of restrictions that are  
8 commonly applied to common stock, that people get it under  
9 certain circumstances, it can be restricted for trading, it  
10 can have various sorts of things on it. Stock can be  
11 restricted in small corporations, so it can only be sold to  
12 family members. The fact that stock is restricted doesn't  
13 mean it's not stock.

14 And if this is -- this motion is granted, these  
15 stock units and stock awards would simply be unrestricted,  
16 and they'd be unconditional, and they're the only thing that  
17 exists that's an economic equivalent of common shares in  
18 LBHI.

19 Now, we know it's disappointing to the holders who  
20 would now prefer to have cash, but the stock was always all  
21 that was promised, and only employees are entitled to  
22 receive under the law.

23 Let me talk a little bit about 510(b). Now, tab 2  
24 in the opening notebook has the full text of Section 510(b).  
25 And as the Court knows, subordination is required, it's not

1 an option for two kinds of claims.

2 "A claim arising from rescission of a purchase or  
3 sale of the security of the debtor," or two, and I'm going  
4 to put in an ellipsis in here, "a claim ... for damages  
5 arising from the purchase or sale of such a security." Now,  
6 the phrase "such a security" is referring back to security  
7 of the debtor.

8 Now, we are dealing with two possible securities  
9 of the debtor here. As I say, the stock awards and stock  
10 units themselves may be considered securities of the debtor,  
11 if the Court agrees that they are within the definition of  
12 security, they're certainly not the security of anything  
13 else except the debtor. They couldn't be securities of some  
14 other entity. They weren't securities of LBI, for example,  
15 even though they were employees of LBI, they were always  
16 LBHI securities.

17 Now, the claimants try to argue that they -- that  
18 they're not securities, because they should -- because of  
19 the exclusion for "debt or evidence of indebtedness for  
20 services rendered."

21 That is an exclusion from the definition of  
22 security. But we believe that that's an incorrect reading  
23 of the term indebtedness.

24 Black's Law Dictionary states that the word  
25 "indebtedness" means "the condition or state of owing

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1 money." That's Black's Law Dictionary, Ninth Edition, 2009.

2                   The record could not be more clear, that the  
3 program documents only dealt with money in those three  
4 narrow circumstances that do not apply here. It dealt with  
5 owing shares of stock. And that is not indebtedness as that  
6 term is commonly understood, and that was not a debt as that  
7 term is commonly understood, particularly in bankruptcy  
8 parlance.

9                   The more compelling point, however, is that the  
10 phrase security of the debtor must include the common stock  
11 of LBHI. That's the only security that we could be talking  
12 about of the debtor. It's a predominant kind of security,  
13 there may be some others, but certainly common stock is a  
14 security of the debtor LBHI, that's beyond question.

15                  The issue then is whether under Section 510(b),  
16 the Court is facing claims for damages arising from the  
17 purchase or sale of security of the debtor.

18                  Now, there's no doubt that all claimants are  
19 seeking money damages as opposed to say specific performance  
20 or an injunction. Nobody is saying, I want you to give me a  
21 piece of paper that says I have RSUs and I have CSAs. If  
22 they want that, we can do that for them probably.

23                  THE COURT: Actually I think -- I mean, it was a  
24 little hard to tell, but I think that at least one of the  
25 witnesses seemed to be saying that, and I think what you're

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1 saying is that you're going to do one better, they're not  
2 only getting an RSU, they're going to get a share.

3 MR. MILLER: Well, I don't think there's -- I  
4 don't think it's possible to issue a share certificate, but  
5 we can certainly get them some statement from the plan  
6 administrator I assume that this is --

7 THE COURT: When I say a share, I mean --

8 MR. MILLER: Yes.

9 THE COURT: -- not a piece of paper, but.

10 MR. MILLER: So what we are talking about here are  
11 money claims of some kind, and there's no doubt that all of  
12 these claims arise from a program that was designed to lead  
13 to the acquisition of a security of the debtor, the common  
14 stock of LBHI, which had great value at the time the initial  
15 services were provided.

16 Now, I do want to also say that conceptually, the  
17 services provided were not just at the time of the initial  
18 work. The services were provided over the whole five years,  
19 in terms of tenure and loyalty. The person had to continue  
20 to work there, which was part of the services, and the  
21 person also had to refrain from disloyal activity, meaning,  
22 going off to the competitors or taking derogatory action.

23 So there were both positive and negative services  
24 that went over the whole stretch of the five years. It was  
25 not completely earned, frankly, under the agreements until

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1 the end of the five years. And at that point, the services  
2 purchased a share of common stock. The deal was, you do  
3 three things, you -- we give you a grant based on whatever  
4 you did in the year of the grant, then you have tenure for  
5 five more years, or your tenure is excused by death,  
6 disability, retirement or bankruptcy, and then you engage in  
7 loyalty over that time period --

8 THE COURT: So what you're --

9 MR. MILLER: -- unless that's excused.

10 THE COURT: -- saying in essence, it was not only  
11 deferred compensation, but it was that a portion of the  
12 services were deferred --

13 MR. MILLER: Yes, Your Honor.

14 THE COURT: -- over the five years until the date  
15 the restriction fell away?

16 MR. MILLER: I'm saying that exactly. It was a  
17 complicated purchase agreement. It was actually -- the term  
18 earn-out was used at some point. It was an earn-out. It  
19 was a period of time over which the results of the work were  
20 to have effect. And we saw, I think Mr. Shotton in  
21 particular, illustrated that some of these people had a lot  
22 of impact on the results.

23 And whether they continued to perform for five  
24 years and their work had a long term success, that was one  
25 of the goals of the program was to encourage them to have a

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1 commitment and a long-term commitment, and to stay there  
2 long enough to follow-up on their own work. So it was a  
3 complicated purchase, but it was a purchase, it was a  
4 purchase of common shares that occurred over a five-year  
5 period, and where the payment was labor.

6 Now, this leads up to the Enron case.

7 THE COURT: Right.

8 MR. MILLER: And the key term in Section 510(b) is  
9 purchase. And Judge Gonzalez has dealt with that very  
10 effectively, and I think some of his words are helpful, just  
11 to focus on a couple of sentences. I particularly commend  
12 to the Court pages 150 and 151 in 341 Bankruptcy Reporter.

13 Judge Gonzalez says, "While it is true that the  
14 claimants did not purchase the stock options on the open  
15 market, they nonetheless exchanged value for the options:  
16 Here, their labor. Such exchange falls under a broad  
17 reading of the term 'purchase'."

18 That, I would suggest, Your Honor, is absolutely  
19 what this evidence has shown. There was an exchange. The  
20 exchange of value was service. As I suggest here, the  
21 service was a little different because instead of having to  
22 pay an extra amount for the stock options, they paid what  
23 amounted to the option price through loyalty and tenure.  
24 They continued to render service over the five year period  
25 of certain types. And when the labor was complete, and the

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1 restraints were complete, they had a purchase.

2 A little later on the page Judge Gonzalez then  
3 "That claims alleging the fraudulently induced election of  
4 stock options as a part of a compensation package or claims  
5 'arising from' the purchase of a security and should thus be  
6 subordinated pursuant to Section 510(b)."

7 THE COURT: So that bit, the fraudulently induced  
8 here would line up with the handcuff claims?

9 MR. MILLER: It would, Your Honor, and it lines up  
10 with -- it actually lines up nicely also with the coercion  
11 claims.

12 But I want to go along to actually a more specific  
13 statement by Judge Gonzalez. On the same page, he turns to  
14 the central argument of the claimants before the Court,  
15 including Neuberger Berman claimants. Here he explains,  
16 "Some of the claimants assert a related claim, but highlight  
17 a key factual difference. These claimants argue that they  
18 never elected to receive stock options, but rather were  
19 required to take a minimum percentage of their annual bonus  
20 in stock option form. This factual distinction, these  
21 claimants argue, demonstrates clearly that they did not  
22 'purchase' stock options, as there was no voluntary exchange  
23 of goods, services, or currency for the options.

24 "While this argument might appear at first blush  
25 intuitively reasonable, the distinction is flawed. Although

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1 implicit, there is nonetheless a bargain and exchange of  
2 value.

3 "Here the exchange was made not at the time of  
4 payment but prior to employment. If these claimants were  
5 required to receive a portion of their compensation as  
6 options, that was a condition of employment that claimants  
7 willingly accepted in return for their labor. These  
8 claimants thus 'purchased' the stock options with their  
9 labor. Therefore, the Court's previous conclusion is  
10 equally applicable to this variation on the above theory."

11 THE COURT: So with respect to the Neuberger  
12 claimants --

13 MR. MILLER: Close quote.

14 THE COURT: -- so they -- what they say is, I  
15 never had a choice because, you know, I was a Neuberger  
16 Berman wealth manager, and I was going along and building my  
17 book, and then Neuberger Berman went public, and I had to  
18 become subject to this restrictive covenant, which I had  
19 nothing to say about that, that was the decision of the  
20 executive management.

21 And then -- so I did that, and I continued to  
22 build my book, and then someone made a decision, not me, to  
23 be acquired by Lehman, and I had to sign, in order to do  
24 that and get the bonus that I was being given and exchange  
25 my shares, et cetera, et cetera, I then had to sign up.

1                   So at no point in this, did I have a meaningful  
2 choice. That's the story line of the Neuberger Berman  
3 claimants.

4                   MR. MILLER: That's right, Your Honor, and it's  
5 basically the same story line as in Enron, except for the  
6 fact that there were various break points along the way  
7 where people made a decision to keep coming to work. There  
8 are some good examples of those.

9                   Mr. Gran, for example, left and came back. There  
10 -- it's been shown repeatedly, and I think actually the  
11 testimony of Mr. Ramallo was a perfect illustration of the  
12 reality of the fact pattern.

13                  He said he was not happy that part of his  
14 compensation be paid on a deferred basis in common stock of  
15 LBHI, but he accepted that because the rest of the package  
16 was such a great opportunity with LBHI, all things  
17 considered, that it was more than he could get anywhere  
18 else.

19                  Now, that was a really acceptance of a condition  
20 of employment. People accept conditions of employment all  
21 the time, they get an office that's too small, they don't  
22 get their own secretary, they don't get a car, but they  
23 decide that the mix of things that they're offered, all  
24 things considered is a better use of their time today than  
25 an economically where they want to put their time tomorrow,

1 and that's exactly what happened here.

2 And in the paraphrasing Too Big to Fail, my  
3 partner, Rob Lemons suggested a good phrase to summarize  
4 this situation, "Too Good to Leave." It was just such a  
5 great deal, all things considered, that they accepted part  
6 of the package that they now say in retrospect they didn't  
7 like.

8 Now, the truth of the matter is, this was a great  
9 package, and it would've been a great package if Chapter 11  
10 had never occurred probably. If LBHI had become AIG and had  
11 come out of the dive and climbed back to altitude, so to  
12 speak, then there wouldn't be any unhappiness about this.

13 So they took a risk, and these are risk taking  
14 people. These are people in -- working for an investment  
15 banking firm. They understand that risk.

16 THE COURT: Well, Ms. Krieger is a risk taking  
17 person. Ms. Krieger seems to have risk follow her around.

18 MR. MILLER: Well, Ms. Krieger --

19 THE COURT: And an extremely unfortunate  
20 situation, so she learned from her experiences before she  
21 came to Lehman that she didn't want to take that risk, and  
22 in fact, you know, she was not -- obviously not a portfolio  
23 manager, not a wealth manager, and I think her earning  
24 levels were, you know, were not in the same category. I'm  
25 not sure that's -- I think that's neither here nor there in

1       terms of the issue, but I think you could probably sort  
2       through these claimants and find, you know, quite an array  
3       of people, you know, in terms of their contribution to the  
4       -- you know, to the firm. But I don't think that that  
5       detracts from your point about, you know, you accept with  
6       your conduct, you keep working, and you accept some of the  
7       good with the bad, and you keep going.

8                    MR. MILLER: Well, I think that's -- Your Honor,  
9       the point that I am making is really two points here. First  
10      of all, what she made is sort of an unconscionability  
11      argument, although if you read her letter, she did some  
12      rather sophisticated analysis of a lot of stuff.

13                  THE COURT: She did, right.

14                  MR. MILLER: We're not talking about people here  
15      who are challenged in terms of their ability to read and  
16      think. We're talking about people at a high income levels.  
17      We're not talking about having a big box store, at which all  
18      the people who stock the shelves were going to be paid in  
19      something years in the future they didn't understand what it  
20      was or how they were going to get it.

21                  THE COURT: Well, I think --

22                  MR. MILLER: We are talking about mature --

23                  THE COURT: I --

24                  MR. MILLER: -- bright educated people here --

25                  THE COURT: I agree with that.

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1 MR. MILLER: -- Your Honor.

2 THE COURT: And that's why it was somewhat  
3 surprising, frankly, to hear some testimony that I think was  
4 sincere and truthful, in which it seemed that some of the  
5 witnesses actually believed that there was an account  
6 sitting somewhere that Lehman was putting money into with  
7 their name on it. I mean, that was kind of a surprising  
8 couple of moments to hear people describe when on the page  
9 it says equity, and they say cash, that there seemed to be,  
10 and I don't know if this is after the fact, but rather than  
11 the words on the page year after year saying equity  
12 deferral, that got translated and was said to me as cash  
13 withholding. And that was -- I mean, I guess this is more  
14 directed towards those who were going to respond, but that  
15 was a very surprising thing to hear from people who are, as  
16 you say, very sophisticated all other things being equal.

17 MR. MILLER: Well, Your Honor, candidly that's  
18 what they have to say at this point. And I mean I'm not  
19 saying that they're being insincere, but I mean, their  
20 position is, I'm disappointed. But I would also suggest to  
21 Your Honor that what they're really saying is, since I  
22 didn't understand this, you ought to set the deal aside and  
23 give me my money back. And that, Your Honor, is rescission.

24 If what they're saying is, I just didn't  
25 understand this, it's exactly the same as the fraudulent

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1 inducement claim that Judge Gonzalez rejected. Okay. If  
2 you were fraudulently induced, and you want it set aside,  
3 you're still subordinated.

4 So it's that cul de sac that Your Honor talked  
5 about.

6 THE COURT: Right.

7 MR. MILLER: It doesn't make a difference whether  
8 they say, I didn't understand the deal, I didn't know what  
9 the deal was, I didn't mean to go into the deal, they all  
10 understood that although they didn't like it, if it played  
11 out as expected, they ended up with common stock and not  
12 with money.

13 There's nobody who said, I thought five years from  
14 now I was going to get a cashier's check. There's no  
15 evidence of that, no one said I thought I was going to get  
16 money or I was going to get a brokerage account that I could  
17 write checks on, they all said, yeah, five years from now I  
18 was going to get common stock.

19 THE COURT: So you may be getting to this, and if  
20 you are, you can just tell me you are, and I won't ask for  
21 an answer right now, but there were a couple of places where  
22 the claimants argued or seemed to attach significance to the  
23 fact when they got the preprinted claim form from Epiq the  
24 field that said basis of the claim was Schedule I think G  
25 executory contracts.

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1           And that that somehow indicates that at that point  
2       in time, Lehman thought that these were general unsecured  
3       claims. And then there was also pointing to two paragraphs  
4       -- well, there are three related points. So there's that.

5           There's the paragraphs in the 1997 trust agreement  
6       which are at Claimant's 62 that talk about in the event of  
7       an insolvency, the trust is subject to the general creditors  
8       of the company, there's that.

9           And then three, there's the removal of the  
10      bankruptcy specific provisions after 2003. And kind of  
11      that's the body of stuff, and there was also an -- I  
12      reference to the statement that says, an RSU does not give  
13      you the claims as a shareholder, but I think I've gone  
14      through that several times, and I have an answer on that  
15      one.

16           But for these other three, I'd like you to respond  
17      to why that doesn't add up to something that indicates that  
18      these folks have the rights of unsecured creditors.

19           MR. MILLER: Surely, Your Honor. Well, first of  
20      all --

21           THE COURT: Or you can keep going, and then just  
22      when you get to them in your outline.

23           MR. MILLER: Your Honor, I'm happy -- I'd rather  
24      do them in the order in which you'd like to hear them.

25           THE COURT: Okay.

1 MR. MILLER: So let's do them that way.

2 First of all, Epiq is an administrator that is  
3 essentially -- was essentially trying to get all the claims  
4 in some sort of buckets, and it had to deal with those  
5 buckets with a computer. And so what it did, was to send  
6 out preprinted forms so that it would know what to do when  
7 they came back and put them in a bucket.

8 The executory contracts bucket meant, these are  
9 people who are believed to be making monetary claims for  
10 something they said they didn't get because there was no  
11 expectation that they were going to ask for stock. And  
12 we're going to have to do some omnibus objections and deal  
13 with those. And that's -- the Court has a series of -- I  
14 think it's thirteen different omnibus objections --

15 THE COURT: Right.

16 MR. MILLER: -- that calls these various RSU  
17 claims to be scheduled and the statement, you know, an  
18 opposition, an objection was filed that said, these are  
19 equity, you're wrong, they're not money, and 3,500 claimants  
20 didn't respond and said, okay, I understand, so.

21 THE COURT: So the executory contract that -- I  
22 mean, Epiq is just an administrator, but be that as it may,  
23 they're an agent of the debtor so. But the executory  
24 contract was the equity award program.

25 MR. MILLER: Yeah. So the executory contract was

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1 the equity award program and these were people who seemed to  
2 be contending that under the equity award program, they had  
3 some claim for money.

4 Some of them, you know, by the way, the equity  
5 award program is more complicated than just RSUs and CSAs,  
6 and there may have been some people who were entitled to  
7 some money. And there could've been a situation where  
8 someone had -- where for some part of those programs, they  
9 said they were going to pay dividends, and they hadn't paid  
10 them. I mean, there may be things that are not even in our  
11 purview. This was a much, much bigger bucket.

12 THE COURT: So that was an executory contract that  
13 at least at that moment in time, needed to be either assumed  
14 or rejected?

15 MR. MILLER: That was right. And it also was an  
16 executory contract that needed to be dealt with through an  
17 objection for reserve purposes. It had to be reserved --

18 THE COURT: Okay.

19 MR. MILLER: -- if it came in and then it had to  
20 be addressed.

21 THE COURT: Okay.

22 MR. MILLER: It may be Mr. Lemons can also --

23 THE COURT: You're getting a lifeline from Mr.  
24 Lemons.

25 MR. MILLER: -- speak to this.

1 MR. LEMONS: Your Honor, I heard your admonition  
2 on the first day that you don't do doubles, but just to  
3 maybe clarify the record a little bit and to what happened.

4 As Your Honor is aware in a case of this  
5 magnitude, there is a huge effort made at the beginning of  
6 the case to try to fill out the schedules in a timely  
7 fashion. What timely is depends on the size of the case --

8 THE COURT: Right.

9 MR. LEMONS: -- and orders of the Court.

10 And the comment, and virtually all large  
11 bankruptcy cases, the debtors take a very conservative  
12 position as to what they listed on the schedules, they were  
13 over inclusive to the extent that there was a choice one way  
14 or the other. And that is why, for example, there was a  
15 typical legend on Schedule G saying that the inclusion of a  
16 contract or lease --

17 THE COURT: Right.

18 MR. LEMONS: -- or other agreement on Schedule G  
19 does not constitute an admission that touched a contract.  
20 Lease or other agreement is an executory contract was in  
21 effect on the applicable petition date, or is valid on  
22 (indiscernible - away from microphone).

23 THE COURT: Right.

24 MR. LEMONS: So this is just part of the massive  
25 administrative effort of trying to sort things into buckets,

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1 you know, for the debtors to try to figure out what to deal  
2 with that happened early in the case. The proof of claim  
3 forms were, as I'm sure Your Honor, you know, can guess,  
4 were electronically generated by Epiq, and it was just a  
5 computer run, and it printed those. Those were sent out to  
6 all of the potential claimants.

7 THE COURT: Right.

8 MR. LEMONS: And they --

9 THE COURT: Okay.

10 MR. LEMONS: -- filled them in. It didn't  
11 guarantee them they had a claim, it frankly didn't prejudice  
12 them, because these people obviously submitted their claims.

13 THE COURT: Right.

14 MR. LEMONS: That's really the sole import and  
15 reason why these things ended up marked as, you know, being  
16 on Schedule G.

17 THE COURT: Okay. All right. Thank you. Okay.  
18 So the next bit then would be the 19 language in the 1997  
19 trust agreement?

20 MR. MILLER: Yes, Your Honor, and I'm -- I don't  
21 know if you have copies of the trust, or if we need to get  
22 them --

23 THE COURT: I have it. I have it right here.

24 MR. MILLER: All right. Let me direct the Court  
25 to 304 clauses, and explain what we believe this was all

1 about.

2                 First, if you turn to page 2, Section A, the last  
3 sentence says, "The trust is not a part of any of the plans,  
4 and does not itself provide retirement or other benefits to  
5 any participant." That is a first point here, that the  
6 trust is not part of a plan, the trust does not provide any  
7 benefits.

8                 THE COURT: Okay.

9                 MR. MILLER: And the trust was not publicized to  
10 the participants, it was created internally, essentially for  
11 the convenience and the financial planning of LBHI, but it  
12 had this obligation to deliver stock in the future, to allow  
13 it to purchase stock over time, and hold it to satisfy not  
14 only the obligations of the RSU and CSA programs, but a  
15 number of other equity award programs, the senior management  
16 program, I believe stock options, whatever. If it needed  
17 shares of stock, it was, in effect, stockpiling stock that  
18 it might have to deliver later.

19                 Now, periods of time had also held little amounts  
20 of money because it purchased that stock on the open market.  
21 So money was put in, and then was used to purchase at  
22 favorable times, the stock on the open market. So it  
23 sometimes held some money. But it was primarily to hold  
24 stock.

25                 Now, if you look down below and I'm going to go

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1 back to the whereas clause, because I think that explains  
2 these, it looked -- on the same page, in subsection 1(e), it  
3 says, "The principle of the trust and any earnings thereon,"  
4 that would be if it held a little cash and got some  
5 interest, "shall be held separate and apart from other funds  
6 of the company and shall be used exclusively for the uses  
7 and purposes of participants and general creditors as herein  
8 set forth."

9 THE COURT: Right.

10 MR. MILLER: "Participants shall have no preferred  
11 claim or any beneficial ownership interest in any assets of  
12 the trust. Any rights created under the plans in this  
13 agreement shall be merely unsecured contractual rights of  
14 participants against the company.

15 "Any assets held by the trust shall be subject to  
16 the claims of the company's general creditors under federal  
17 and state law in the event the company becomes insolvent, as  
18 defined in Section 3(a) hereof."

19 Now, in bankruptcy language, the Court will  
20 recognize that this is to make sure that if there were a  
21 claim for monetary amounts, such as an election that had  
22 been made to pay dividends in cash or there had been a  
23 change of control, which could by the way be mixed up with a  
24 bankruptcy, or there were fractional shares, those would be  
25 general unsecured claims, they would not be secured claims

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1       secured by this trust. That's what this is talking about.  
2       And it was designed to make it clear that any claims for  
3       money are unsecured claims.

4                 The whereas clause is again --

5                 THE COURT: What about the sentence that says,  
6       "any rights created under the plans and this agreement shall  
7       be mere unsecured contractual rights of participants against  
8       the company"? What does that sentence mean?

9                 MR. MILLER: Well, that means, Your Honor, that  
10      any plan -- any claims that do exist under the plans for  
11      money are unsecured claims. They're not secured claims.  
12      That's all it says.

13                 THE COURT: But the claimants are saying that's  
14      exactly what they have. They --

15                 MR. MILLER: They have an unsecured claim for  
16      stock, Your Honor, and there was stock in this trust, and  
17      they would have an unsecured claim for stock certificates if  
18      there was a shortage on that. They would also have an --  
19      but it -- would it be an unsecured claim. It wouldn't be  
20      that they were secured with specific stock certificates, for  
21      example.

22                 It's not like they would have a preference if  
23      stock certificates were not generally available. And it  
24      also, Your Honor, says that again if there were monetary  
25      claims, they're not keyed to the money in this trust. And

1 if I can finish with the whereas clause --

2 THE COURT: Go ahead.

3 MR. MILLER: -- and what happened to the money, I  
4 think this will be even clearer.

5 Back to the whereas clause; the first -- the third  
6 whereas clause, which they like to emphasize, "Whereas, the  
7 company wishes to establish a trust, and to contribute  
8 and/or sell to the trust assets including shares that shall  
9 be held therein, subject to the claims of the company's  
10 general creditors in the event the company becomes  
11 insolvent, as defined herein, until paid to participants as  
12 herein defined in such manner and at such times as the  
13 company may specify to fulfill the company's obligations  
14 under the plans."

15 So the subject to the claims of the company's  
16 general creditors was a modifier of the goals of the plan.  
17 Meaning that if there is an insolvency, the trust actually  
18 goes away, and that's what happened, Your Honor.

19 The trust had a little cash in it, not a little,  
20 but not a very large amount, and in the process of  
21 administration, the trust was dissolved, and that cash was  
22 put back in the general unsecured creditor pool. That's  
23 what was always intended. It was not held apart, or some  
24 other use, it was put back in, and all the documents are  
25 designed to work that way.

1           THE COURT: But then why -- it says, "to  
2 contribute and/or to sell to the trust assets including  
3 shares that shall be held therein subject to the claims of  
4 the general creditors in the event of insolvency."

5           So then under that logic, upon the bankruptcy, the  
6 shares would get distributed to the general unsecured  
7 creditors.

8           MR. MILLER: Well, the shares were released to the  
9 treasury stock I believe. I'd also point out --

10          THE COURT: Right?

11          MR. MILLER: -- Your Honor, that the --

12          THE COURT: Right?

13          MR. MILLER: -- claimants are not parties to this  
14 agreement. The testimony shows they didn't even know that  
15 the trust existed. This didn't create any rights of  
16 claimants. What this did was to establish administratively  
17 what the company was going to do to plan and deal with  
18 various sorts of obligations. I'm told by the way, there  
19 are tax consequences that also impacted how it was  
20 structured. I can't explain those fully, I don't know them.

21          I would point out another paragraph 4 -- on page  
22 4, it's in Section 3(a). It says, "Subject to Section 3(b)  
23 hereof, the trustee shall not make any payments if the  
24 company is insolvent." It says it won't pay. And what it  
25 says in Section B on page 4 is, "At all times during the

1 continuance of this trust as provided in Section 1(e)  
2 hereof, the principal and income of the trust shall be  
3 subject to claims of general creditors of the company under  
4 federal and state law, as set forth below."

5 And then it has a procedure. The board of  
6 directors and the chief executive officers have to inform of  
7 insolvency, and the trust determines whether it's insolvent,  
8 and any time the trustee determines it's insolvent in  
9 paragraph 3, it's going to discontinue payments and hold the  
10 assets for the benefit of the general creditors. And then  
11 number 4, it shall not resume payments until it's determined  
12 the company is not insolvent, and thereafter has received an  
13 instruction schedule. And then it has a provision that  
14 says, under certain circumstances it can be dissolved.

15 THE COURT: So now that we're looking at this  
16 again, I mean, if you look at Section 3.3, literally read,  
17 "If at any time the trust is determined that the company is  
18 insolvent," so clearly the company is insolvent, "the  
19 trustee shall discontinue payments and shall hold the assets  
20 of the trust for the benefit of the company's general  
21 creditors."

22 And that seems to suggest that there's a reading  
23 that says any shares that were in this trust actually go to  
24 the general unsecured creditors.

25 MR. MILLER: Your Honor, they go back, I believe,

1 to the treasury of the company where they'd be subject to  
2 the --

3 THE COURT: To the general unsecured.

4 MR. MILLER: -- general unsecured creditors,  
5 right, and it gets there.

6 THE COURT: So --

7 MR. MILLER: But the part of the denominator in  
8 the great equity interest.

9 THE COURT: So then the sentence that says,  
10 "any --" I'm back to 1(g), 1(e), "any rights created under  
11 this plan, shall be mere unsecured contractual rights of  
12 participants against the company."

13 So what's a -- who's a participant under this?

14 MR. MILLER: I believe participants is defined,  
15 Your Honor -- it says defined herein, let me see where the  
16 definition is.

17 THE COURT: You've got to love corporate lawyers  
18 who don't put the definitions up front.

19 MS. SOLOMON: Your Honor, if I may, the definition  
20 section is at the end of the document.

21 THE COURT: Yeah, that's another place they put  
22 it, thank you. Participants shall mean an individual who  
23 holds an eligible award or such individuals estate of  
24 beneficiaries, eligible award means award under a plan.

25 So that -- so participant, in fact, I think refers

1 to an employee who's participating under the equity awards  
2 program. And then the way I think you could read that is,  
3 it says, "mere unsecured contractual right". I mean, I  
4 think that's where we started today perhaps that that means  
5 that they have a right to compel performance under the  
6 contract. And here performance under the contract is the  
7 issuance of the share.

8 MR. MILLER: I think that's exactly right, Your  
9 Honor. And this -- again, this document is not part of a  
10 plan, it didn't contribute -- it didn't create rights. The  
11 participants were not parties, they're not described as  
12 beneficiaries. They are -- and the assets were specifically  
13 held for the benefit of general creditors.

14 If the Court should rule that there is some  
15 monetary obligation to pay and it's not subordinated, these  
16 would be general creditors. If the Court holds that they're  
17 subordinated as equity --

18 THE COURT: Well, but it also looks like it says  
19 that there would be general creditors who have a claim  
20 against these assets.

21 MR. MILLER: These assets are just general  
22 assets --

23 THE COURT: But they're all --

24 MR. MILLER: -- of the company.

25 THE COURT: They're all just shares.

1 MR. MILLER: That's true, Your Honor.

2 THE COURT: So it kind of -- it's another  
3 circularity, I think.

4 MR. MILLER: I believe that's right, Your Honor.

5 THE COURT: Okay.

6 MR. MILLER: You also asked about the removal of  
7 the bankruptcy provisions. I think we've talked about that  
8 some, Your Honor.

9 What those bankruptcy provisions said is exactly  
10 consistent with or precisely consistent with what has ended  
11 up happening here. In that what they said was, that  
12 bankruptcy was going to work like death, disability or  
13 retirement, in that the remaining obligations of tenure and  
14 loyalty disappear, just like they do in death, disability  
15 and retirement. And if the company is in a position to  
16 issue stock, it was going to try to get out and issue stock.  
17 It doesn't say anybody gets money, and it gives a -- kind of  
18 a notice that 510(b) may apply or will apply.

19 So it actually has sort of a cautionary statement  
20 of the law. As we discussed, all references to bankruptcy  
21 were removed later. We believe that the -- we don't know  
22 why, but we believe the most logical explanation is people  
23 decided why are we saying this, you know, if there's a  
24 bankruptcy who knows what's going to be happening, and  
25 furthermore, the law changes, and we don't want to be giving

1 legal advice in these documents, we don't have to, so they  
2 were just removed.

3 There was no announcement to anyone that there'd  
4 been an improvement or enhancement and unlike all the other  
5 investment banking firms, if we should become insolvent,  
6 you're going to get cash for a -- cash claims for your  
7 deferred compensation, that would actually be quite a  
8 significant benefit.

9 Someone like Ms. Krieger who had been through two  
10 bankruptcies would be really pretty interested in that. If  
11 she were on the line about whether to stay or whether to  
12 leave, that might make her stay and that might make her feel  
13 even, if it's possible, even more like an owner than she  
14 already felt.

15 So it makes no sense that this could be inferred  
16 as a change in the program. There's also -- I mentioned at  
17 the beginning, this rule that changes in the plan is going  
18 to be made by the committee --

19 THE COURT: Right.

20 MR. MILLER: -- committee documents, minutes, all  
21 those things have been produced. There's nothing that  
22 indicates that there was any change in the plan --

23 THE COURT: Okay.

24 MR. MILLER: -- for the removal of this provision.  
25 It is, as she said, the only way you could figure out -- Ms.

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1 Krieger said, the only way you could figure out about this  
2 bankruptcy change was to compare the fine print, as she put  
3 it, and see that there was some fine print for a couple of  
4 years, and the fine print went away.

5 And it's not appropriate to call that a  
6 subordination clause, as the claimants like to. It's not a  
7 clause that says something that wasn't subordinated will  
8 become subordinated. That's under 510(a). It's not a  
9 510(a) clause, it's a 510(b) disclosure or statement, if you  
10 will.

11 THE COURT: Right.

12 MR. MILLER: And if they say, okay, because I  
13 didn't get a 510(b) statement, then the later plan years  
14 should be set aside, we have rescission, and we're right  
15 back into 510(b).

16 I do want to clarify one point here --

17 THE COURT: There's one more thing and I'm  
18 watching the clock --

19 MR. MILLER: Yes.

20 THE COURT: -- and I have taken up a fair amount  
21 of your time, but there's one more specific thing that I  
22 wanted you to respond to, and that's the November 17th, 2008  
23 Q and A that informed the Neuberger claimants that you're  
24 going to get cash for your 2008 deferral in January 2009.

25 MR. MILLER: Yes, Your Honor. I think that Ms.

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1 Steiger, actually gave us the facts on that, because she  
2 confirmed that this was in the middle of an auction process.

3 UNIDENTIFIED: Ms. Stiefel.

4 MR. MILLER: I'm sorry, Ms. --

5 THE COURT: Stiefel.

6 MR. MILLER: There's a Ms. Steiger and there's Ms.  
7 Stiefel. I'm sorry, I'm going to get her name --

8 THE COURT: Stiefel.

9 MR. MILLER: Stiefel, S-t-e --

10 THE COURT: Yes.

11 MR. MILLER: Okay. I got it. I'm sorry, Your  
12 Honor.

13 Ms. Stiefel I think made it clear that they were  
14 in the middle of an option process that Bain and other  
15 parties started and there were other people who were looking  
16 at it, and then -- and management meanwhile was trying to  
17 put together its own plan, maybe not visible to the  
18 employees, and management issued the Q and A.

19 And if you look at the rest of the Q and A, which  
20 is now unredacted, and I encourage the Court to do that, I  
21 just saw it yesterday, you will see that this is a whole  
22 bunch of stuff that says, please don't leave. We're still  
23 open for business, we're operating, don't go anywhere.  
24 You're going -- things are going to be fine.

25 So this was all management who was in the process

1 -- and this was not a debtor. This subsidiary was not --

2 THE COURT: Right, so this was not a debtor.

3 MR. MILLER: This was a non-debtor --

4 THE COURT: Non-debtor entity. So --

5 MR. MILLER: -- subsidiary.

6 THE COURT: -- therefore, so that gets exactly to  
7 my question, which is that -- so these payments are made in  
8 January of 2009, at which point in time, management won the  
9 auction, right.

10 UNIDENTIFIED: (indiscernible)

11 MR. MILLER: Well, Your Honor, management was  
12 trying to win the auction, the auction -- I believe the  
13 closing had not been --

14 THE COURT: Okay.

15 MR. MILLER: -- completed. I don't -- I have a  
16 timeline somewhere.

17 THE COURT: I don't think the closing was  
18 completed, but my question is that, so cash gets paid to  
19 these individuals.

20 MR. MILLER: Yes, Your Honor.

21 THE COURT: And that cash came out of -- couldn't  
22 -- it couldn't be debtor cash, right, because there --

23 MR. MILLER: Well --

24 THE COURT: -- would have -- I mean, this is just  
25 interesting to me, we're going back in ancient history here.

1 So somebody pays these people cash, that's contrary on its  
2 face to the existing program. And now these folks are  
3 saying, ah-ha, the fact that we were paid cash demonstrates  
4 that we were really entitled to cash. When what the context  
5 indicates is that there was a bidding war, the value of the  
6 business as the witnesses testified very clearly, the value  
7 of the business resides largely in the relationships, which  
8 are tied up because of the restrictive covenants, but be  
9 that as it may.

10 So then the management at Neuberger decides, we  
11 need to keep these people in place, we're going to pay them  
12 this cash.

13 So my question, being a bankruptcy judge is, huh,  
14 what was the authority to pay that cash? This is a dialogue  
15 I'm having in my head, right. And I say, well, wait,  
16 Neuberger was not a debtor entity. Neuberger's not a debtor  
17 entity, these employees have shares, RSUs redeemable,  
18 convertible into debtor stock. And yet this payment was  
19 made. Did they seek Court authority? I'm just sharing with  
20 you my little dialogue in my head. Because was it an  
21 unauthorized payment, or did the Lehman -- did the Neuberger  
22 management have this right to just pay this cash?

23 So I don't have -- I'm not at the -- I ran out of  
24 time talking to myself, and I don't have an answer. So I'm  
25 hoping you can supply me with an answer for how did this

1 come about.

2 MR. MILLER: Well, I made need assistance again  
3 from the real bankruptcy lawyer here, but let me try. I do  
4 have a timeline which I will represent to the Court we  
5 believe is accurate.

6 THE COURT: Okay.

7 MR. MILLER: In Thanksgiving -- in the  
8 Thanksgiving period in 2008, management of Neuberger Berman  
9 working with Lehman developed a proposal for a management  
10 buy-out of 51 percent of the business with Lehman retaining  
11 49 percent of the business.

12 December 1st, 2008, the auction was held, and the  
13 management proposal was successful. And there was an  
14 agreement entered into with NBSH Acquisition LLC, which was  
15 the acquisition vehicle, which was entered into as of  
16 December 1st, 2008.

17 On December 22nd, 2008, the bankruptcy court  
18 approves the management buy-out by LBSH (sic) Acquisition,  
19 ECF No. 2350.

20 Now, I understand, and I guess our belief is, is  
21 that part of that approval was that Lehman was doing  
22 something to support the management buy-out, and there was  
23 some splitting of the sheets. There was a division of  
24 assets. And we know that LBHI was the cash manager. So  
25 LBHI had to figure out how much cash went into the new

1 Neuberger entity --

2 THE COURT: Right.

3 MR. MILLER: -- it had a 39 percent interest in.

4 THE COURT: Right. So it was an asset -- it was a  
5 stock purchase agreement or an asset purchase agreement?

6 MR. MILLER: I don't know the answer to that, but  
7 I believe it was a separate subsidiary.

8 THE COURT: It was a separate subsidiary. Well,  
9 I'm not going to guess, but I'm just reacting --

10 MR. MILLER: Do we know?

11 THE COURT: -- to your statement that the assets  
12 included cash --

13 MR. MILLER: Well --

14 THE COURT: -- had to be bucketed, but.

15 MR. MILLER: Yes.

16 THE COURT: Okay. So.

17 MR. MILLER: And we can check on this, but I am  
18 told, Your Honor, that part of the agreement between --

19 THE COURT: Management.

20 MR. MILLER: -- Lehman and management was that  
21 this production income that had come into the cash accounts  
22 of LBHI --

23 THE COURT: Right.

24 MR. MILLER: -- all of that production income that  
25 was not already drawn down --

1 THE COURT: Right.

2 MR. MILLER: -- was going to go to Neuberger to do  
3 with --

4 THE COURT: Right. So --

5 MR. MILLER: -- as it wished.

6 THE COURT: So --

7 MR. MILLER: So management had control.

8 THE COURT: -- it's like a post-closing  
9 adjustment. You have a purchase of a business, and there's  
10 a delay between the signing and the closing, and you have to  
11 account for the revenue that the business generates between  
12 the signing and the closing. And usually, I mean, I'm not  
13 -- I haven't seen it, but I'm talking about how it will  
14 usually go, is that part of the purchase price assumes a  
15 certain division of that cash flow, and then if it's high or  
16 low, there would be a post-closing adjustment to make up for  
17 that. Otherwise, there's no way to really kind of peg the  
18 consideration that somebody pays in that kind of a  
19 transaction.

20 So I think what you're saying is that the fees  
21 begin to continue to generate, and then they followed --  
22 they left Lehman and went to Neuberger Berman as of the time  
23 it was closed, and that was the cash that -- I mean, this is  
24 all with a question mark at the end of it --

25 MR. MILLER: Well --

1                   THE COURT: -- that that was the cash. But also  
2                   -- so given the time frame and given -- well, it's just  
3                   interesting to me whether or not at the time, and I still  
4                   think that probably in that period of time, there was still  
5                   kind of fog before that was settled over the case.

6                   But I just -- no one at the time made a motion to  
7                   approve the payment of these monies. Mr. Lemons, did they?

8                   MR. LEMONS: Your Honor, if I may, I was --

9                   THE COURT: In the fog.

10                  MR. LEMONS: Well, I was in the fog of derivative  
11                  termination notices coming in, so --

12                  THE COURT: Okay.

13                  MR. LEMONS: -- not personally involved in  
14                  Neuberger. My understanding of what happened is that, and  
15                  this will sound a little bit vague, but essentially, there  
16                  was a sorting out of assets between Neuberger and Lehman  
17                  that occurred as part of this whole transaction process,  
18                  assets and cash from Lehman went to Neuberger. Neuberger's  
19                  management then did whatever it wanted with that cash. And  
20                  it decided to pay these employees this amount because it was  
21                  Neuberger's cash, a non-debtor's cash, and it was  
22                  Neuberger's decision. There was a decision made and no need  
23                  to seek bankruptcy court approval, because this was an act  
24                  by a non-debtor outside of the restrictions of 363 and the  
25                  other restrictions of the Bankruptcy Code.

1 THE COURT: Right. I mean so that --

2 MR. LEMONS: That's the general outline of --

3 THE COURT: Yeah. Well, that's what -- I mean,  
4 that's what I would assume that it was, you know,  
5 Neuberger's cash and they made a decision to do what they  
6 wanted to with it. But I think -- go ahead, I'm sorry.

7 MR. MILLER: And I believe Ms. Stiefel said that.  
8 She said the decision to pay this cash was made by the  
9 management of Neuberger Berman.

10 THE COURT: Oh, that's clear, but I think what the  
11 claimants are asking for is an inference that just based on  
12 this answer that if you receive production compensation  
13 through the year, and have compensation deferred under the  
14 equity award program, those deferrals have been placed in  
15 the trust with Wells Fargo, and you're going to get a  
16 payment.

17 SO I think that that's being cited as evidence of  
18 that, when it says equity, it really means cash.

19 MR. MILLER: Yes, Your Honor, and if you read the  
20 whole redacted document, one of the things that you will  
21 notice is that there is a statement that they say what's  
22 going to happen next year, and then there's sort of a vague  
23 statement that says, there's going to be some sort of a  
24 deferred compensation program next year. It doesn't say  
25 what I tis.

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1 MR. KAPLAN: That's the next document. That's O.

2 MR. MILLER: Okay. It's the other document, O.

3 One of those two documents. Well, it's one of the documents  
4 that's been cut into two pieces; is that not true? I'm  
5 sorry?

6 MR. KAPLAN: The one that was distributed on the  
7 17th of November and one that was disseminated on the 31st.

8 MR. MILLER: Okay.

9 THE COURT: But why was this -- so why was this  
10 produced in a redacted form?

11 MR. KAPLAN: I was asked by the Neuberger  
12 counsel's office that they considered the other parts of it  
13 irrelevant --

14 THE COURT: Right, they considered it --

15 MR. KAPLAN: -- to the issue.

16 THE COURT: -- irrelevant because it doesn't  
17 reflect favorably on the point that they're to make. That's  
18 not the --

19 MR. KAPLAN: No, no.

20 THE COURT: -- standard for redaction.

21 MR. KAPLAN: No, no, that's not true. It talks  
22 about their travel expenses and what's going to happen in  
23 the year 2009. And they -- and the Neuberger counsel's  
24 office, not the claimants, and not me, decided that it  
25 should be redacted. Then when Mr. Miller asked that it be

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1 unredacted --

2 THE COURT: Okay. Just for future reference,  
3 that's not the way it works. If you redact a document it's  
4 because you're claiming that it's privileged, under  
5 attorney/client privilege or work product or some common  
6 interest privilege, not applicable here, or because it  
7 contains sensitive proprietary --

8 MR. KAPLAN: Right.

9 THE COURT: -- commercial information that would  
10 pass the standard articulated under Section 107. It -- the  
11 producer of the document does not get to make the relevance  
12 cut, I do.

13 MR. KAPLAN: Your Honor, I understand that. The  
14 document was produced in discovery without objection. The  
15 first time there was a question about the document was two  
16 weeks ago, when I got an objection to it from Ms. Alvarez.  
17 And at that I indicated what the other subject matter in the  
18 document was.

19 MR. MILLER: Well --

20 MR. KAPLAN: And then when we started this  
21 hearing, there was an issue about the entirety of the  
22 document, and I agreed to produce the entire document.  
23 That's how it evolved.

24 THE COURT: Let's move on. Go ahead, Mr. Miller.

25 MR. MILLER: Yes, Your Honor, again, just a couple

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1 of more points of fact on the timing. The actual closing I  
2 think was May 4th, 2009, so the closing took some time. I  
3 do understand that since that time management has purchased  
4 Lehman's business interests over time, and there's an  
5 agreement for the remaining interests to be purchased over  
6 time, so management will ultimately end up with a hundred  
7 percent share.

8 I think when you read those documents in context,  
9 as I say, this is a whole series of assurances and one of  
10 the assurances is that there will be some kind of deferred  
11 compensation. I would point out that LB -- that Neuberger  
12 Berman did not have tradable common stock. So it didn't  
13 really have the option to replace the LBHI program at that  
14 point with a common stock program. It had to deal with  
15 cash. The only way it could do this, it couldn't say this,  
16 okay, you're going to Neuberger stock, Neuberger stock  
17 didn't exist.

18 So in terms of what was practical for Neuberger if  
19 it wanted to retain people, money was the only option.

20 So, Your Honor, I realize our time has been --

21 THE COURT: Did you have other points that you  
22 wanted to make because I --

23 MR. MILLER: Well, a few other --

24 THE COURT: -- have rather interrupted you.

25 MR. MILLER: -- yes, so a few other key points,

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1 Your Honor --

2 THE COURT: Okay.

3 MR. MILLER: -- that I just want to -- actually  
4 what I'd like to do is if we can let Ms. Alvarez talk about  
5 the Wage Act for just less than ten minutes.

6 THE COURT: Sure, okay.

7 MR. MILLER: And then I have just a few more  
8 follow-up points, which --

9 THE COURT: Okay.

10 MR. MILLER: -- might take three minutes or five  
11 minutes.

12 THE COURT: Okay.

13 MR. MILLER: And then I do want to reserve ten  
14 minutes if I might --

15 THE COURT: Okay.

16 MR. MILLER: -- for whatever may be said that I'm  
17 not expecting.

18 THE COURT: Okay.

19 MS. ALVAREZ: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MS. ALVAREZ: I'll just spend a few minutes on the  
22 Wage Act claims.

23 Ms. Solomon clarified earlier this week, if I  
24 understood her correctly, that claimants are not contending  
25 that the actual RSUs or CSAs are wages, but that claims are

1 instead for fixed amounts that were allegedly withheld by  
2 Lehman from their compensation.

3 The evidence that we've seen, Your Honor, shows  
4 that the claimants were paid their compensation. Lehman  
5 agreed to pay them partly in cash, and partly in these  
6 restricted stock units or contingent stock awards.

7 And I'll point you to -- it's Exhibit 1 to the  
8 stipulation, so the stipulation is CL001, it's one of the  
9 sample employment contracts. I'm just pointing to the  
10 highlighted language that was in the opening statement  
11 binders. It says very clearly, that at the firm's option, a  
12 portion of your total compensation may be payable in the  
13 form of restricted stock units. And there's no dispute here  
14 that these claimants were paid in restricted stock units.

15 This is not one of those cases as Your Honor  
16 pointed out a couple of days ago where an employee of  
17 promise to pay a certain amount in cash, and then halfway  
18 through the year decided hey, I'm going to withhold, you  
19 know, a certain amount of cash and not pay you everything.

20 Lehman was very clear up front in the employment  
21 contracts, employee handbooks what was going to be paid, and  
22 that a portion would be paid in cash, and a portion would be  
23 paid in RSUs or what we would consider equity.

24 Another point I would just like to point out is  
25 that to the extent that the claimants are alleging that

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1 these RSUs are wages, the wage laws provide that unless you  
2 have a quantifiable amount, they are not wages. And a good  
3 source for this would be Guiry versus Goldman Sachs, which  
4 is a First Department case in New York. And the vast  
5 majority of these claimants were employed in New York State.

6 In Guiry --

7 THE COURT: But aren't they saying that they do  
8 have a quantifiable amount, and the quantifiable amount is  
9 the notional value, notional amount of the RSUs that they  
10 got during the subject year? So they got, you know,  
11 \$500,000 worth of RSUs which was then converted to shares  
12 because that's what they did, but they're basically saying  
13 that \$500,000 is the fixed amount that you should now give  
14 me in cash. Plus I think some of them have indicated that  
15 they want interest on that because of the five year old.

16 MS. ALVAREZ: Right. The problem with that, Your  
17 Honor, is that they were not promised that fixed amount.  
18 That amount was used to determine how many RSUs they would  
19 be granted. They would be granted those RSUs, and assuming  
20 the necessary conditions were met, at the end of the five  
21 year period, that was used to issue common stock.

22 And in the end, the value of their compensation  
23 really was the value of the common stock at the end of the  
24 five year period. And, you know, a good example of that was  
25 this was the (indiscernible) you referenced earlier that was

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1 attached to Ms. Krieger's proof of claim form, which is  
2 CLX55.

3 By August 31st, 2008, her shares, if issued,  
4 would've been worth 5 cents a share, it would've been \$205  
5 of compensation. There was no fixed amount at the time the  
6 RSUs were issued.

7 And if you look at Guiry versus Goldman Sachs,  
8 that's exactly what the Court held. That case also, Your  
9 Honor, involved RSUs that had been issued to a commission-  
10 based employee.

11 THE COURT: Is that in -- is that case in your  
12 papers?

13 MS. ALVAREZ: Yes, it is. It's in our opening  
14 memo on pages 33 and 34. It's also in our responding --

15 THE COURT: Okay.

16 MS. ALVAREZ: -- memo, so it's in both of them.

17 THE COURT: Okay.

18 MS. ALVAREZ: And let me just read a quote from  
19 that case. The Court there held that "It is always possible  
20 that a deferred award of stock or stock option ultimately  
21 will turn out to have no value." And that wages was not  
22 intended to include supplemental income that could prove  
23 worthless when ultimately received. And I think that's just  
24 a perfect example and completely analogous to our situation  
25 here.

1           The other point I just wanted to point out is  
2       there was some argument over the last couple of days about  
3       non-disclosure that Lehman didn't disclose enough about the  
4       program. It's clear that every -- at least every claimant  
5       who testified here knew that at the firm's option, a portion  
6       of his or her compensation could be paid in these restricted  
7       stock units or contingent stock awards.

8           Mr. Miller also demonstrated at the beginning  
9       during his opening that they were informed of this in their  
10      employment contracts, the employee handbook, the program  
11      documents that were distributed throughout the years.

12           Your Honor pointed out yesterday that the only  
13      evidence of non-disclosure that you had seen related to  
14      whether -- what would happen in the event of a bankruptcy.

15           Now, what would happen in the event of a  
16      bankruptcy is not the sort of disclosure required by the  
17      wage laws. Typically, these disclosures require, you know,  
18      the amounts of the amounts -- the amounts that will be  
19      withheld from compensation when they'll be withheld, what  
20      they would be used for.

21           What happens in the event of a bankruptcy is  
22      essentially legal advice. And as we know, these were not  
23      unsophisticated people, they knew that the price of stock  
24      could go up, the price of stock could go down, and yet they  
25      continued, they made the decision to continue working for

1 Lehman under this compensation scheme.

2 And then the final item that I'd like to point  
3 out, Your Honor, is that even if claimants do have a valid  
4 claim for compensation in the form of RSUs, that gets us  
5 back to 510(b). That's a damages claim for unpaid comp in  
6 the form of RSUs and that arises from the purchase or sell  
7 of a security.

8 So -- I mean, and there are several cases.

9 There's obviously Enron. In --

10 THE COURT: I think that Mr. Ramallo specifically  
11 seemed to be making that claim, but I could be recalling  
12 incorrectly.

13 MS. ALVAREZ: Making which?

14 THE COURT: The claim that he didn't get the RSUs.  
15 It was a little hard to tell, but in any event.

16 MS. ALVAREZ: Right. Well, in the end, we think  
17 that gets us back to the same cul de sac --

18 THE COURT: Okay.

19 MS. ALVAREZ: -- described in 510(b),  
20 subordination.

21 THE COURT: Okay. Thank you.

22 MS. ALVAREZ: Thank you.

23 MR. MILLER: Very briefly, Your Honor, just so I  
24 have a full fair opening. There are a few more points I'd  
25 just like to take through in about five minutes or less.

1 THE COURT: Sure.

2 MR. MILLER: First, there were 3,500 claimants who  
3 were reclassified and that included all of the employees of  
4 Neuberger Berman except the ten who are here with counsel,  
5 and perhaps a few more that are pro se that are hard to  
6 identify. There were about a thousand of those.

7 Those were people who are recognized that they  
8 were willing to accept equity and not cash. So it's -- the  
9 3,500 includes a lot of Neuberger Berman people. I just  
10 want the Court to know that.

11 No one complained by the way about this alleged  
12 coercion or economic duress in 2003, 2004, 2005, 6, 7 or 8,  
13 all the complaints first arose when lawyers were retained,  
14 the RSU objections were filed and somebody decided, hey,  
15 maybe there's economic duress. There's not a shred of  
16 evidence, nobody's produced an e-mail, nobody's produced  
17 anything that said, there was duress, there was  
18 unconscionability, there was anything. There's just nothing  
19 in the record about that.

20 And the Neuberger Berman claimants say that they  
21 had no choice about changing firms, but no one tried.  
22 There's not a person who testified, there's not any evidence  
23 that somebody went out and looked.

24 Mr. Shotton who testified got a deal from LBHI  
25 when he came over as the global head of risk management.

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1 LBHI bought out the bonus he left behind at JPMorgan. There  
2 is evidence that that was the practice in the industry.

3 This whole idea that they had handcuffs, what it  
4 really meant was, they were not valuable enough anywhere  
5 else to get anybody to buy out their prior work, their  
6 future potential was not enough to make them more valuable  
7 anywhere else. That was the economics.

8 And so they willingly accepted the condition of  
9 employment. They didn't like it, but they willingly  
10 accepted it perhaps and that is the correct test as  
11 specified in Enron.

12 Fourth point, if you look at the Twotso  
13 declaration, the ten claimants made multiples of their cash  
14 compensation in 2003 and later years. The cash compensation  
15 alone put them at the very top of the range of annual  
16 compensation in this country. Their willing acceptance of a  
17 condition that they did not like was, on this record, driven  
18 by other benefits that far outweighed it. And that is not  
19 economic coercion, there's no doctrine that converts a  
20 contract into something else. A contract for delivery of  
21 stock after a five year period with certain performance  
22 required into a contract for money that was somehow on a  
23 piece of paper at an earlier date, that was used to compute  
24 the number of shares of stock.

25 The money here was to convert to shares of stock

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1 on a date. And there was the discount. So it was -- in  
2 effect, it was an early purchase of this conditional stock.  
3 And so they got the appreciation, they held it literally  
4 held for them.

5 The discussion with Ms. Krieger about compensation  
6 ratios is a little complex. But one of the points it made  
7 is that the equity awards program actually benefitted  
8 employees by letting Lehman compete with others. All the  
9 other firms had these equity awards programs. If Lehman  
10 didn't have one, it either had to pay too high a  
11 compensation ratio which had a lot of negative effects, or  
12 it couldn't retain and get good people.

13 So the idea that this was somehow harming  
14 employees is a misunderstanding. And there was no trickery  
15 here, everything was fully disclosed.

16 By the way, I would note, and I think Mr. Schager  
17 may agree with this because we've discussed it, the evidence  
18 has not shown any distinction between RSUs and CSAs. We  
19 don't think there's any reason you need to treat them  
20 differently.

21 The final point, Your Honor, which I think we've  
22 made, but I do just want to make sure it's clear. All of  
23 the arguments lead to what Your Honor called the cul de sac  
24 of Section 510(b).

25 The claimants have offered no evidence to get them

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1 out of that cul de sac. No legal theory gets them away from  
2 the fact that they are seeking either damages or rescission  
3 from a complex system that ended up being an exchange of  
4 labor for common stock of LBHI. And that's a purchase of a  
5 security of the debtor.

6 They paid with labor, they paid with loyalty, they  
7 paid with tenure, which was more labor, and they ended up  
8 with common stock. That's a purchase.

9 It's the same as if somebody agreed to work for a  
10 while managing a hotel, and at the end of the time, they'd  
11 own the hotel, or managing an apartment and getting free  
12 rent. They exchanged labor for something.

13 THE COURT: Well, they would say on that one, they  
14 would say, but then the hotel burns down.

15 MR. MILLER: Well, if the hotel burns down, then  
16 obviously they have to figure out what the arrangements  
17 were. But this hotel did not burn down and disappear.

18 If the answer was that I get to buy the hotel as  
19 is/where is, I get the hotel as is/where is at some point in  
20 the future, which -- this was as is/where is stock, they got  
21 themselves a burned down hotel, and they've got to buy  
22 insurance on it.

23 So, you know, by the way, since I work on the  
24 derivatives, I can tell you that these people could've  
25 purchased credit protection in Lehman stock, if they liked

1 to, insurance was available, if that was their concern, but  
2 it cost them money. And so it is actually possible to  
3 insure, now probably in small quantities, but it's possible  
4 to do that.

5 All these claims go back to the purchase of these  
6 common shares of LBHI. It's a complicated purchase, it  
7 takes five years, but the only outcome is that the claimants  
8 get a share of stock. And that's exactly what the claimants  
9 will have if the motion to reclassify is granted, and what  
10 35 other claimants have.

11 And the Court talked about the balance in  
12 bankruptcy between debt and equity, and if we think about  
13 the characteristics of debt, and I know the Court is very  
14 familiar with this, it is normally something that either can  
15 be determined at the time it's entered into or has a formula  
16 that allows it to be determined. And it's something that  
17 does not share in the upside of the business.

18 And the exposure to the downside is limited by  
19 going to the top of the priority pyramid. That's sort of  
20 the trade out of debt.

21 On the pure equity end of the spectrum, there is  
22 no guarantee that there is -- and so the fixed value of that  
23 varies literally minute-to-minute on the stock exchange if  
24 you buy stock. And -- but there's an upside. It's sharing  
25 in the participation, and there's a downside, and in order

1 to have people who have the knowledge and want to go into  
2 the equity side of the equation, they go to the bottom of  
3 the priority period, a pyramid.

4 These awards are clearly on the equity side of  
5 that divide. They had upside, they didn't have a guaranteed  
6 amount or a formula, they were knowledgeable people dealing  
7 with the business over a long period of time, just like  
8 investors select the business. They are not people who  
9 delivered packages for Lehman Brothers because they had a  
10 package delivery service. They were not people who sold  
11 food or who delivered electricity, who didn't have the kind  
12 of knowledge, and you had a fixed rate, those are on the  
13 debt side of the spectrum.

14 So when you look at this, the Enron case is  
15 correct, that what 510(b) is about, is about which side of  
16 the teeter totter do these rights go on. And these rights  
17 clearly go on the equity side of the teeter totter. And in  
18 that case, they have to wait in line because they had the  
19 upside benefit and they didn't have any guarantee, and they  
20 knew what they were getting into, maybe they weren't happy  
21 about this part of it, but overall they agreed to it. And  
22 under those circumstances, the law requires, it's not an  
23 option, and I want to stress LBHI doesn't care which  
24 claimants get paid, but it wants to pay the claimants who  
25 were entitled to get paid, and not pay claimants who were

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1 not entitled to get paid the limited cash assets, because it  
2 doesn't look like there's going to be enough to go around.

3 And unfortunately, and we are sorry about this,  
4 LBHI has concluded and believes the Court should conclude,  
5 that these people are on the side, they have to wait in  
6 line, to see if there's any money left over for equity.

7 THE COURT: All right. Thank you very much.

8 MR. MILLER: Thank you, Your Honor.

9 THE COURT: All right. Would you like to keep  
10 going, or would the claimants who are arguing like to take a  
11 few minutes break? Now, that you've --

12 MR. SCHAGER: Five to 12, Your Honor, I would ask  
13 this, what's the backstop for the Court?

14 THE COURT: Well, I don't think I know what you  
15 mean by that. What I'd like to have happen is that there  
16 not be repetition among the folks who stand up. So have you  
17 had a chance to coordinate your remarks?

18 MR. SCHAGER: I believe we have, Your Honor, yes.

19 THE COURT: Okay. All right. Well, why don't we  
20 take one of the 15-minute folks, and then perhaps we'll take  
21 a short break.

22 MS. SOLOMON: Your Honor, (indiscernible).

23 THE COURT: You had an agreed order.

24 MS. SOLOMON: That -- yeah, that Mr. Schager would  
25 go first and he's the longer one.

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1                   THE COURT: Okay. All right. Then I'm going to  
2 need to take a break until five minutes after 12, all right,  
3 and then we will start at five minutes after 12, and we will  
4 go till we're finished. All right?

5                   Okay. Thank you.

6                   (Recessed at 11:54 a.m.; reconvened at 12:11 p.m.)

7                   THE COURT: And remind me before we depart to have  
8 some clarity about the submissions that I'd like you to  
9 make.

10                  Mr. Schager, for half an hour, yes, give or take?

11                  MR. SCHAGER: Hopefully, you won't have a lot of  
12 questions, Your Honor, so I can stretch it out a little bit.

13                  THE COURT: I wouldn't count on that, but go head.

14                  MR. SCHAGER: Your Honor, before I start, I would  
15 like to offer to the Court, and I had distributed to  
16 counsel, a compilation of statutory provisions and one page  
17 of website of history, may I approach the bench and offer  
18 it?

19                  THE COURT: Okay.

20                  MR. SCHAGER: It's obviously not evidence, it's  
21 just for the convenience of the Court.

22                  THE COURT: Okay.

23                  MR. SCHAGER: Your Honor, it might surprise you to  
24 hear that I'm not challenging Enron here today. I'm not  
25 running away from it, I think it's a final decision, I think

1 it's completely inapplicable. I'm also not running away  
2 from the statute, and nor are the claimants. The statute I  
3 think is very clear, and that's what we're going to address  
4 in my time this morning, my allotment, it's supposed to be a  
5 half an hour out of the hour allotted for the claimants.

6 I want to focus primarily on the statutory  
7 definitions particularly of equity security and security.  
8 And I'm going to start right away with the definition of  
9 equity security, because I think it's very clear. That's  
10 tab 1 of the statutory compilation I've just given you.

11 There is no question that the term equity security  
12 is a narrower definition than the definition of security at  
13 101.49, and that's fine, but the first thing to note in it  
14 is what we have highlighted in 101.16(c). And that is,  
15 other than a right to convert.

16 In the fact stipulation, Your Honor, that's part  
17 of the record here, that conversion is a negotiated term,  
18 but the fact stipulation does contain the concession that  
19 what happened with RSUs is that they converted at the end of  
20 the hold period.

21 THE COURT: But there was no right to convert.

22 MR. SCHAGER: Well, I think -- there was no right  
23 to convert, Your Honor?

24 THE COURT: No, there wasn't --

25 MR. SCHAGER: There was no right to accelerate

1 conversion, that's correct.

2 THE COURT: No, there was no right to convert.

3 The RSU converts into stock, it's not a right to convert. A  
4 right to convert is you hold a debt security that you can  
5 convert to an equity security. That's a right to convert.

6 The holder of the RSU didn't have any right to  
7 convert. The instrument converted by itself. So keep  
8 going.

9 MR. SCHAGER: Well, that's an interesting point,  
10 Your Honor, but I don't think it's correct, because there  
11 were ways to walk away from the RSUs, we've emphasized that.

12 You exercise a right to convert by staying  
13 employed and honoring the employment arrangements. And if  
14 we're going to consider that consideration for a purchase as  
15 we have talked about elsewhere, that's certainly the ability  
16 to get something by performing certain conditions.

17 I think I -- you know, I don't think we can brush  
18 it off so easily, Your Honor. There was a right to walk  
19 away, there was a right to stay around, and that staying  
20 around ultimately involved the right to convert.

21 But I wanted to call the Court's attention to one  
22 other thing, and that is, the rest of 101.16(c), which is  
23 the right to purchase seller subscribed to a share. There  
24 is under tab 3, the second page, that's the definition of  
25 security from the Bankruptcy Code.

1 THE COURT: Uh-huh.

2 MR. SCHAGER: And that same language appears in  
3 Section 101.15, that's significant to us in terms of looking  
4 at stock options. Right. So the -- but the language is  
5 parallel, 101.49.

6 THE COURT: So in Enron, were there at RSUs at  
7 issue in Enron?

8 MR. SCHAGER: No, there were not, Your Honor.

9 THE COURT: There were stock options.

10 MR. SCHAGER: They were stock options, that's  
11 right. And that's one of the main distinguishing features.  
12 But the -- and I want to get that, because that's a very  
13 important point for us, but I just wanted to walk right  
14 through 101.16, and that is that the -- it's emphasized  
15 there that the right to convert is excluded from the  
16 definition of an equity security.

17 Now, the argument was made, two arguments were  
18 made there that I think I have to address. One is that A  
19 and B, you have -- the RSUs were really a share of stock, or  
20 an interest in a limited partnership. No one is disputing  
21 that a share of stock in a corporation or a limited  
22 partnership interest is security, also defined that way in  
23 101.49(a). Okay. It would not make sense to include an RSU  
24 that does not have those rights in A or B. If RSUs fit  
25 anywhere in 101.16(a), it would have to fit in (c), and

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1 that's what brings into focus the right to convert, which is  
2 a specific exclusion for something like an RSU that  
3 converts.

4 Now, I have also included, Your Honor, the  
5 legislative history, the definition of Section -- it was  
6 15 --

7 THE COURT: Where in the organic documents  
8 governing RSUs are there -- is there a right to convert?  
9 Where is there a right to convert? Show me.

10 MR. SCHAGER: In fact stipulation, I believe it's  
11 paragraph 3, Your Honor, specifically describes the -- what  
12 happens to RSUs at the end of the holding period.

13 THE COURT: It says --

14 MR. SCHAGER: Those RSUs get converted.

15 THE COURT: They convert, right.

16 MR. SCHAGER: If you meet certain conditions that  
17 have been --

18 THE COURT: Right.

19 MR. SCHAGER: -- discussed on several occasions.

20 THE COURT: Okay. So you've answered my question.  
21 There is no right to convert, the instrument, the  
22 restriction on the stock unit falls away, and it becomes  
23 stock. It starts out life as a restricted stock unit, and  
24 after the satisfaction of the hold period, the time period,  
25 the earn-out, however you want to characterize it, it

1 converts. Nobody has to do anything. Nobody exercises a  
2 right. The restricted stock unit becomes a stock unit.  
3 It's not -- does not require a -- the exercise of a right to  
4 convert.

5 MR. SCHAGER: Like a stock option requires an  
6 exercise. I think you're right, Your Honor, and I'm not  
7 sure -- I don't think I dispute that. But I will say, I  
8 will point to the legislative history once again for this  
9 focus on a right to convert.

10 THE COURT: Go ahead.

11 MR. SCHAGER: And the legislative history uses the  
12 passive voice. Securities that are convertible into equity  
13 securities are not equity securities until they're  
14 converted.

15 THE COURT: Right. And the example that's given  
16 is such as convertible debentures, which is debt.

17 MR. SCHAGER: That's correct.

18 THE COURT: That is describing a conversion from  
19 debt to equity, which is a right that somebody exercises.

20 MR. SCHAGER: There are many kinds of convertible  
21 instruments, Your Honor. The statute itself doesn't refer  
22 to debt securities. The statute says a security with a  
23 right to convert.

24 And I don't think the legislative history by using  
25 an example of convertible securities effectively amends the

1 statute that said --

2 THE COURT: Then you shouldn't be using the  
3 legislative history at all. You can read some of the  
4 decisions that I've written for my view on legislative  
5 history. My view on legislative history is that when you  
6 rarely, if ever, should resort to legislative history  
7 because it's unreliable indication of exactly what it is  
8 that the drafters of the provision intended.

9 MR. SCHAGER: Okay. And I'm not going to dispute  
10 that, Your Honor.

11 THE COURT: Okay.

12 MR. SCHAGER: I think that's fine, I'm happy to  
13 focus on the statutory language.

14 THE COURT: Okay.

15 MR. SCHAGER: And the statutory language has  
16 nothing about convertible debt. It says, an instrument with  
17 a right to convert, and that's -- and I emphatically think  
18 that's what an RSU did, because it didn't just happen  
19 automatically under all circumstances. You had to do  
20 something in order for that conversion to take place.  
21 That's the whole logic that we've been talking about in  
22 terms of this so-called purchase with your labor in Enron,  
23 which I have some other distinctions about.

24 But that's what happens here. There is a right to  
25 get those shares if you stay around long enough and perform

1 your negative covenants.

2 And then I would refer the Court, Your Honor, to  
3 Section 101.49. And in conclusion, on 101.16, obviously is  
4 the RSUs as conversion rights are not covered by 101.40 --  
5 16.

6 101 --

7 THE COURT: So just to go back to the point about  
8 the right to convert, so you concede that a stock option is  
9 an equity security? Is a stock option --

10 MR. SCHAGER: Yes, I concede that --

11 THE COURT: Okay.

12 MR. SCHAGER: -- the stock option is an equity  
13 security, it's right there in 101.16(c).

14 THE COURT: Okay.

15 MR. SCHAGER: Yeah.

16 THE COURT: So with a stock option, where somebody  
17 actually has to pay money, right, in order to --

18 MR. SCHAGER: Critical difference.

19 THE COURT: -- get the stock --

20 MR. SCHAGER: Yes.

21 THE COURT: -- they have to pay money.

22 MR. SCHAGER: That's right.

23 THE COURT: Right? The money doesn't get paid  
24 automatically, you have to actually decide I'm going to buy  
25 that stock option, I'm going to exercise the right, right?

1           To convert the stock option into stock, I have to  
2 affirmatively do that, right?

3           MR. SCHAGER: Well, I would agree with all of  
4 that, Your Honor, except the word conversion.

5           THE COURT: Okay. I have to turn the stock option  
6 into a piece of stock, right?

7           MR. SCHAGER: You exercise a stock option, Your  
8 Honor, absolutely correct.

9           THE COURT: All right. Exercise a stock option.

10          MR. SCHAGER: Yeah. Right.

11          THE COURT: And I have to affirmatively do  
12 something.

13          MR. SCHAGER: Right.

14          THE COURT: But in the case of the RSUs, where you  
15 don't have to pay the money, to get the stock, all you have  
16 to do is be around and still be at Lehman, and in fact, you  
17 get a bonus, because you're getting the stock at the  
18 discount price, you're getting the friends and family  
19 discount, that is less of an equity security than the  
20 situation where you have to pay money to get the stock.

21          Just walking away from the statute --

22          MR. SCHAGER: Yeah.

23          THE COURT: -- the logic of your position is that  
24 a right to convert which you say that's not the purchase of  
25 an exercise of a stock option, the mere conversion without

1 any affirmative act means that an RSU is not an equity  
2 security. But in the case where you actually have to do  
3 something or you don't get the stock, that's an equity  
4 security. There's no logic to that.

5 MR. SCHAGER: Well, the logic is there in the  
6 statute, Your Honor. That's how it's defined. Yes, an  
7 equity -- a stock option is an equity security, that's  
8 clear, because it's right there as a right to purchase,  
9 which is the black letter law definition of a stock option;  
10 a word of -- a right to purchase, sell, or subscribe to a  
11 share.

12 THE COURT: And if you're going down this path,  
13 then the counter argument would be that the RSU is a right  
14 to purchase a share, which you purchased with your five  
15 years of continued labor at LBHI.

16 MR. SCHAGER: No, I don't --

17 THE COURT: Well, you can't --

18 MR. SCHAGER: There is --

19 THE COURT: You're picking and choosing words  
20 right in the same statute. If you say that there's a  
21 warrant or right, and if it's not a right to convert, then  
22 it's a right to purchase the stock. That's what an RSU is.  
23 A RSU is a right to purchase the stock with your labor.

24 MR. SCHAGER: The RSU is a right to receive stock  
25 on conversion.

1 THE COURT: Okay. Why don't you keep going.

2 MR. SCHAGER: This may come clear when we look a  
3 little more at the definition of a stock option, and how the  
4 stock options worked in Enron, Your Honor, which is  
5 something that I wanted to spend some time on.

6 THE COURT: Mr. Schager, you know, the statutory  
7 analysis is not going to get you there. There -- I've  
8 listened to two days of testimony. I've looked at reams of  
9 these documents, okay, there's not been a single shred of  
10 evidence, live testimony, or documentary evidence that  
11 indicates that any of these people at any level had any  
12 reasonable understanding that if they didn't get these  
13 shares of stock, they got cash. That's the fundamental  
14 question here, is that the claimants accepted these RSUs,  
15 continued to work, in many instances, the five years rolled  
16 off. They got the shares.

17 They continued to work, and it was only when  
18 catastrophe struck, that they then constructed an argument  
19 that this, in fact, was not an equity deferral program.  
20 This was somehow my cash that Lehman withheld from my  
21 paycheck, that now in bankruptcy, I should get.

22 Never once, for one second, during all the  
23 testimony did anybody indicate any reasonable basis for a  
24 belief that there was cash being withheld from their  
25 paychecks.

1                   The "Dear Colleague" letters, the glossy  
2 brochures, the compensation statements, the way their  
3 compensation was treated for the purposes of taxes, every  
4 single thing was consistent with the real time understanding  
5 that they were getting part of their pay in cash, and part  
6 of it in deferred equity compensation.

7                   There is nothing, nothing in the record that any  
8 of these people in real time believed anything otherwise.  
9 Indeed, it would be truly extraordinary for me to find that  
10 they did when I am -- when you're talking about the global  
11 head of risk management at Lehman Brothers, with an under  
12 graduate degree in particle physics, that he didn't  
13 understand that part of his pay was in equity. Okay.

14                  The Neuberger Berman broker, who made upwards of  
15 \$10 million, that he didn't understand that the deferred  
16 portion of his compensation was equity, and that there was  
17 upside risks and upside gain and downside risk.

18                  Ms. Stiefel, she understood it. She understood  
19 it, she just didn't want to give up her well-earned  
20 reputation, book of business and livelihood. There was  
21 somebody who clearly loved what she did.

22                  Every single one of these witnesses, every single  
23 one, not one of them said that they didn't understand what  
24 was going on. Not one.

25                  And now we have what amounts to a clever lawyer

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1 argument based on an incorrect reading of the statute, and I  
2 came into this with an extremely open mind, and I've become  
3 more and more dismayed as we've gone through these three  
4 days.

5 So keep taking me through the legislative history  
6 and the statutory definitions, but --

7 MR. SCHAGER: Well, I'm going to back up a moment,  
8 Your Honor.

9 THE COURT: -- it's not going to get you there.

10 MR. SCHAGER: I -- well, I'm going to back up a  
11 moment anyway because I think there are -- the approach  
12 here, defined by Lehman, is that there are one of two  
13 reasons that these claims should be basically converted to  
14 equity --

15 THE COURT: Right.

16 MR. SCHAGER: -- or subordinated to the equity  
17 level.

18 THE COURT: Right.

19 MR. SCHAGER: One is that there is something to do  
20 with the purchase or sell of a security, under 510(b). And  
21 obviously, the central fact is, are these RSUs securities.  
22 And the testimony that we had yesterday from every plaintiff  
23 about the absence of an investment decision relates directly  
24 to whether these equity --

25 THE COURT: They absolutely made an investment

1 decision.

2 MR. SCHAGER: -- whether these were securities.

3 THE COURT: Their decision was to continue to  
4 work, and accept compensation in the form partially at the  
5 firm's discretion, at the firm's discretion in the form of  
6 RSUs. That what -- they made a volitional decision to  
7 accept that compensation; not a single one of them had to do  
8 it. Was it a tough choice? Sure it was. But they decided  
9 to take it.

10 So the fact that they then could not vote at a  
11 shareholder's meeting, that doesn't matter. They agreed to  
12 accept compensation in the form of something called a  
13 restricted stock unit. It wasn't called deferred cash  
14 compensation convertible into stock, it was called a  
15 restricted stock unit. And every single piece of paper that  
16 they got year in and year out talked about it in those  
17 terms.

18 MR. SCHAGER: Your Honor, I was trying to make two  
19 points, one on the definition of securities and one on  
20 equity security. But let's turn with what you've just said  
21 on the definition of securities. And there's a whole line  
22 of pieces that we've discussed that involve several Supreme  
23 Court decisions that say that what the employer is looking  
24 at, at the economic -- in the economic reality analysis,  
25 it's clear that the employee is selling his labors to obtain

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1 a livelihood. And all of these witnesses testified to that.

2 The RSUs were a relatively small part of the  
3 overall package, and the fact is, that they were -- they  
4 came to Lehman for their careers. They all testified to  
5 that. I know that you don't like the idea of declarations,  
6 but we've got forty of them in there that basically say that  
7 and they're uncontested. (Indiscernible) Lehman --

8 THE COURT: What's your point? What's your point,  
9 is that they came --

10 MR. SCHAGER: That if someone comes to work, Your  
11 Honor --

12 THE COURT: Yes.

13 MR. SCHAGER: -- and the Supreme Court has said  
14 that -- that's a Supreme Court's (indiscernible), selling  
15 his labors primarily to obtain a livelihood.

16 THE COURT: Okay. And the term said --

17 MR. SCHAGER: So what's granted pursuant to the  
18 livelihood, this is the (indiscernible) line of cases that's  
19 not a security because there's no investment decision there,  
20 your decision is to come to work for your livelihood, for  
21 your career.

22 THE COURT: There's no logic to what you're  
23 saying. There's no logic to what you're saying. I -- you  
24 get a job offer, and you're told, here's the compensation  
25 that you're going to be paid. At that moment in time, you

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1 decide, huh, do I want to work at One Bowling Green. Do I  
2 want to have this kind of office or that kind of office, do  
3 I want to make this much in salary and these benefits. You  
4 have a decision that you make.

5 And in this case, each and every one of these  
6 individuals at some point in time, had a decision. Do I go  
7 to work for Lehman, or do I not go to work for Lehman. Do I  
8 go to work for Neuberger Berman, or do I not go to work for  
9 Neuberger Berman.

10 There was a lot of talk about handcuffs. There  
11 are no handcuffs. There were no handcuffs. There were  
12 choices, there were choices.

13 MR. SCHAGER: There were choices to go to work --

14 THE COURT: There were cost --

15 MR. SCHAGER: -- that's correct.

16 THE COURT: Yes, there were cost benefit choices.  
17 So once you get a letter that says, come to work for Lehman  
18 Brothers, this is what we're going to pay you, and you  
19 accept, that's it. This was not, and I clarified this at  
20 every turn, this was not a bait and switch. This was not a  
21 bait and switch. This was not come to work for Lehman  
22 Brothers, and we're going to pay you \$200,000 a year in  
23 cash, and then six months in, you get a notice in your  
24 paystub that says, we've changed the terms of your  
25 employment, we're now going to deduct half of what you would

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1 otherwise get and we're going to give you RSUs instead.

2 That is not what happened.

3 MR. SCHAGER: Your Honor, the -- I'm going to  
4 refer you to the Daniel's (ph) case again and many cases  
5 that cite it. That when the employee comes to work, and  
6 he's given a job, and a salary or a wage, and he's given an  
7 interest in the employee benefit plan --

8 THE COURT: Yes.

9 MR. SCHAGER: -- he does not have a right to sue  
10 under securities laws for anything that happens with the  
11 employment benefit plan because it is not a security. And  
12 it makes no -- that's the line from Daniels and I'll read it  
13 again, because primarily --

14 THE COURT: You can read it --

15 MR. SCHAGER: -- the --

16 THE COURT: -- all you want, it's inapposite. It  
17 does not apply to this situation. It is citing a body of  
18 case law that is inapposite to this situation. You -- what  
19 that compares to here is the fact the origin of 510(b),  
20 which is you when you have an equity security, you can't  
21 convert your claim because your equity security all of a  
22 sudden becomes worthless, you can't elevate your claim on  
23 your equity security by suing with respect to the purchase  
24 or sell of that equity security.

25 So what that line of cases says is that you've got

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1 to claim for your wages, but you don't get a claim under the  
2 securities laws. It's the same type of concept.

3 MR. SCHAGER: You have a --

4 THE COURT: You don't start with something and  
5 then get to elevated, turn it into something else.

6 MR. SCHAGER: Well, the holding is you have a  
7 claim for your wages, of course, if they have not been paid,  
8 you have a claim --

9 THE COURT: Right. So here --

10 MR. SCHAGER: -- for your interest in the pension  
11 claim --

12 THE COURT: -- the claimants --

13 MR. SCHAGER: -- but it's not a securities claim.

14 THE COURT: Right. Here the claimants have a  
15 claim for their wages. They got paid their cash and we've  
16 established already that they -- their RSU, the conversion  
17 feature fell away as a result of the bankruptcy, and they  
18 now have stock.

19 There is -- there are no unpaid wages here. They  
20 got what they were told they were going to get. Cash and  
21 RSUs that become stock after you get through the  
22 restrictions. That's what they were told and that's what  
23 they got.

24 Unfortunately catastrophe struck and the stock is  
25 not worth anything. And if they did have those claims then

1 each and every claimant who accepted stock prior to 2008  
2 then one could make the argue they're estopped, they waived  
3 it, they accepted it, they wanted it.

4 MR. SCHAGER: Accepted stock, Your Honor.

5 THE COURT: Yes, they accepted the stock.

6 MR. SCHAGER: Right.

7 THE COURT: They accepted the benefit of being in  
8 the program, which was during the years leading up to the  
9 bankruptcy the greatest rise in the stock market ever, which  
10 then of course precipitously dropped, and they got that  
11 stock, those individuals who started and then went into the  
12 -- through the bankruptcy. They got the full benefit of  
13 that run up, which now many of them now look back and they  
14 say, people should have gone to jail.

15 Okay, well, but they got the benefit, those folks  
16 whose RSUs converted prior to the filing they actually got  
17 the benefit of that run up in Lehman's stock.

18 MR. SCHAGER: Well that's --

19 THE COURT: -- and now -- and then for the extent  
20 that they continued and had RSUs that were still restricted  
21 they then said no good anymore because it came down. That's  
22 all this case is about.

23 MR. SCHAGER: Well, the case is about the statute,  
24 Your Honor, I'm sorry. Yeah, of course the people who had  
25 their RSUs that converted don't have a claim for equity,

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1       they don't -- they're in an equity position because their  
2       RSUs --

3           THE COURT: But what about the --

4           MR. SCHAGER: -- converted.

5           THE COURT: What about the --

6           MR. SCHAGER: That's right --

7           THE COURT: What about the folks --

8           MR. SCHAGER: -- in the legislative history with  
9       what the statute says.

10          THE COURT: -- who collected shares and sold them  
11       for five or ten years before the bankruptcy, okay?

12          MR. SCHAGER: And --

13          THE COURT: And in a regular type of a contract  
14       case you would say, waiver, estoppel.

15           You can't accept the benefit of a program and then  
16       claim that it's not what it was that entire time. You can't  
17       accept the characterization of it for that entire period of  
18       time and then when it becomes less valuable to you you say,  
19       forget that history, now what I want is something else.

20          MR. SCHAGER: All of these people testified, Your  
21       Honor, and they did in the declarations as well that have  
22       not been rebutted, is that when they had the ability to make  
23       an investment decision, a fundamental characteristic of a  
24       security as used in 510(b), when they have the ability to  
25       make an investment decision they sold. Prior to having that

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1 ability they've got some other bundle of rights but they're  
2 not securities as defined in the Code.

3 THE COURT: So what are they? What is it?

4 MR. SCHAGER: Well if I could use an illustration,  
5 Your Honor.

6 THE COURT: What is a restricted stock unit  
7 awarded pursuant to an equity program? What is it?

8 MR. SCHAGER: A restricted stock unit regardless  
9 of what it's awarded to. A restricted stock unit is a  
10 contract undertaking, we paid you -- we will pay you in five  
11 years for these services that you declared in current year.

12 THE COURT: We will pay you in stock. We will pay  
13 you in stock.

14 MR. SCHAGER: We will pay you in a currency called  
15 stock, that's correct.

16 THE COURT: We will pay you in stock, shares of  
17 the corporation. It doesn't say we will pay you in shares  
18 of the corporation that we guarantee to you will be at least  
19 the issuance amount of these RSUs, otherwise we will pay you  
20 in cash. It doesn't say that. It says we will pay you in  
21 stock at the then prevailing market price.

22 MR. SCHAGER: Your Honor, there are equity awards,  
23 Lehman knew how to issue them. Mr. Miller has referred to  
24 other types of equity and awards that they had.

25 I'll pick an example of restricted stock, because

1 that's in the literature that's covered in our brief. You  
2 can issue restricted stock with all the same restrictions  
3 that are contained in the RSUs, right? You can match them  
4 up line for line, okay? Then when the employee receives  
5 them he can look at those and say the award was going gain  
6 over the next five years, I'd rather pay the income tax now  
7 even though it's subject to these restrictions.

8 THE COURT: That wasn't the deal that each of the  
9 claimants signed up for. They signed up for being paid in  
10 cash and restrictive stock units.

11 At that moment in time if that dear colleague  
12 letter had said, at the firm's option we're going to pay you  
13 with Monopoly money --

14 MR. SCHAGER: Your Honor --

15 THE COURT: -- and that employee --

16 MR. SCHAGER: -- what I'm trying to explore  
17 here --

18 THE COURT: -- and that employee decided to take  
19 the job, then at the firm's discretion that employee could  
20 have been paid in Monopoly money.

21 There was nothing illegal about the compensation  
22 in a restricted stock unit, it didn't say we're going the  
23 pay you in -- you know, in contraband, it offered to pay  
24 with a perfectly legal form of compensation, a restricted  
25 stock unit.

1                   And the notion that the lack of an investment  
2 decision, that's a red herring argument, because that going  
3 in it was clearly explained, for example, you don't have the  
4 rights of a shareholder until you get the stock, but the  
5 stock -- your stock is going to be placed in trust and a  
6 trustee is going to vote on behalf of you, a beneficiary of  
7 that pool of stock.

8                   That's what you got, that's what they knew they  
9 got, that's what they accepted by not leaving the employment  
10 of Lehman and by continuing to work.

11                  MR. SCHAGER: The question still, Your Honor, is  
12 what that is that they got. Okay? And I'm trying -- I've  
13 tried to address this in two different ways now, but I'm  
14 going go back to the last one that I was dealing with, and  
15 that is if you got -- if you really got something, the  
16 employee, at the time of the award then he had a right to  
17 elect to pay tax on it right then.

18                  THE COURT: So what you're saying is that the --

19                  MR. SCHAGER: And then over the incremental time  
20 the increased gain he could get at a capital gain rate that  
21 all the employees talked about they're not having that  
22 option. the literature says they don't have that option.

23                  THE COURT: They didn't have that option --

24                  MR. SCHAGER: They didn't have that option.

25                  THE COURT: -- that's exactly right. The option

1 that they --

2 MR. SCHAGER: And what does the literature say  
3 about why they don't have that option? It's because they  
4 don't have anything exact the contract right to get paid in  
5 five years time.

6 THE COURT: They had the right to not accept that  
7 form of compensation, that going in they knew would not be  
8 income to them until the stock was issued. And Lehman's  
9 treatment of it was entirely consistent with that, because  
10 they booked it as a compensation expense at the end of the  
11 five years. The story is entirely consistent. Lehman did  
12 not deduct it as a compensation expense until the end of the  
13 five years.

14 Now, now there's a retrospective look that says,  
15 well that enabled Lehman to, you know, in essence cook the  
16 books, and you know, deflate its -- you know, undervalue its  
17 expenses.

18 The irony in that argument is that if you go down  
19 that rabbit hole you would get to the point that says that  
20 Lehman would have gone under much, much earlier, and that  
21 might have been a good thing. But those aren't -- those  
22 aren't our facts. Those aren't our facts.

23 MR. SCHAGER: Just a quick point clarification,  
24 Your Honor, and that is that the compensation expense as you  
25 correctly note was a tax deduction at the end of the five-

1 year period --

2 THE COURT: Right.

3 MR. SCHAGER: -- when it was recognized as

4 income --

5 THE COURT: That's right.

6 MR. SCHAGER: -- for the five-year period.

7 THE COURT: Right.

8 MR. SCHAGER: The compensation expense was  
9 actually amortized over the five-year period, so that Lehman  
10 did recognize it before financial statement disclosure  
11 purposes as a compensation expense over the five-year  
12 period.

13 I've got two unfinished thoughts, Your Honor --

14 THE COURT: Go ahead.

15 MR. SCHAGER: -- and I'm -- I guess I'll just  
16 finish off my comparison, and that is what's been referred  
17 to in the papers and the tax code as the 83(b) election. An  
18 employee did not have the right to do that because he had no  
19 property received. If he had received property under  
20 Section 81 then the employee has the obligation to pay tax  
21 on it, and under 83(b) there's that ability to make --  
22 that's really enforced by 83(b) and under 83(b) you're not  
23 required to make the tax payment at the time of the grant,  
24 you make the tax payment when the restrictions are lifted.  
25 But you do have the right to -- you have to right to pay tax

1 as if there were no restrictions so you can get capital gain  
2 treatment for the accrual over the following five years.

3 That's something that's available for restricted  
4 stock, that's something that's available for a grant of  
5 securities, if you'll pardon the expression, but it's not  
6 available for RSUs because there's no grant, there's nothing  
7 granted, it's I think comparable to a lease. You've got a  
8 promise to pay something over time, but you don't have the  
9 payment until you get it five years later.

10 THE COURT: Right. You've got a promise to pay in  
11 stock. In stock. And the -- LBHI has made good on that  
12 promise. The promise was to pay in stock, not in cash.

13 MR. SCHAGER: Your Honor, I'm going find the cite,  
14 but I'm going to mention a case, because I think what you  
15 have is -- yes, you have a right that would be discharged in  
16 stock.

17 It's the American Wager case that I'm having  
18 trouble finding the citation for, but that's the case where  
19 the consultant was promised to be paid a certain percentage  
20 of the value of the IPO when the company went public, okay?

21 THE COURT: Right.

22 MR. SCHAGER: And that's really the hypothetical.  
23 That case illustrates the hypothetical. What happens if an  
24 employee was terminated for cause? Right? And he gets no  
25 RSUs.

1 THE COURT: Right.

2 MR. SCHAGER: So he goes to court. What does he  
3 fight over in court, the RSU agreement? No, he doesn't  
4 fight over that. He fights over whether there was cause to  
5 terminate him.

6 THE COURT: Right.

7 MR. SCHAGER: And if he wins --

8 THE COURT: Yes.

9 MR. SCHAGER: -- that's his remedy. His remedy is  
10 not the RSUs, his remedy is money damages.

11 THE COURT: Well, hold on, you're making that up.

12 I mean --

13 MR. SCHAGER: I'm not making it up, that's the  
14 American Wager case, Your Honor.

15 THE COURT: But you're -- you could sue for  
16 specific performance. If you -- I mean or the damages would  
17 be the amount of the value of the stock that you didn't  
18 receive. That -- that doesn't --

19 MR. SCHAGER: Actually in the case he was  
20 initially awarded the stock and that wasn't what he wanted.  
21 He wanted cash. Well wait, there's another step to this,  
22 because he got the cash that he wanted --

23 THE COURT: Okay, so --

24 MR. SCHAGER: -- and then the company went  
25 bankrupt and he had to sue in bankruptcy and there was the

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1 action there to subordinate his claim because it was a stock  
2 claim. And the court said, no, there's no subordination  
3 here.

4 THE COURT: It wasn't a stock claim because it was  
5 as claim on a money judgment.

6 If these folks want cash on account of the value  
7 of their stock that amount of cash unfortunately is zero,  
8 because the stock is not worth anything.

9 So if Lehman Brothers the moment before the  
10 bankruptcy or if they were -- if it was not a crash landing  
11 on September 15th as it was, if they had done bankruptcy  
12 planning and they had said all the RSUs vest, everybody has  
13 got stock, then these folks would have gone into the  
14 bankruptcy with stock. Good news, the five-year hold is up,  
15 you can -- you're going into bankruptcy with stock.

16 There's just -- there's no way -- there's no way  
17 around it. You have not cited any single thing to me that  
18 indicates a basis for saying that this was a promise in the  
19 event of the bankruptcy to pay you cash in the amount of the  
20 RSUs that you were issued in a given year. Nothing says  
21 that. Nothing. Nothing.

22 There would be no -- there's no basis for anybody  
23 to make that assertion that they thought or they commenced  
24 their employment and continued their employment with the  
25 expectation that they would some day get cash for their

1 shares. Zero.

2 MR. SCHAGER: There was certainly the reasonable  
3 expectation that they would be paid the bonuses that were  
4 declared, Your Honor.

5 THE COURT: And they were. They were all given --  
6 they all got their RSUs or this -- and -- unrestricted RSUs.  
7 They got what they bargained for, they just don't like it  
8 because it's not worth -- it's not worth anything.

9 MR. SCHAGER: The question under 510(b) is whether  
10 they got securities.

11 THE COURT: Okay, so let's -- so let's assume for  
12 the --

13 MR. SCHAGER: Right?

14 THE COURT: -- sake of the rest of your -- of your  
15 argument that they're not securities, right? So then what?  
16 Let's assume -- I'm sorry, not for the purposes of 510(b).  
17 So they're not equity securities, but then you're saying  
18 that 510(b) doesn't apply because they're not? Why doesn't  
19 510(b) apply?

20 MR. SCHAGER: Because -- well the language of  
21 510(b) is that purchases and sales or actions for rescission  
22 in connection with the purchase or sale of security gets  
23 subordinated.

24 THE COURT: Okay. So now --

25 MR. SCHAGER: So if there's not a security --

1 THE COURT: -- so these --

2 MR. SCHAGER: -- I don't think 510(b) applies.

3 THE COURT: -- these aren't securities. They're  
4 not securities.

5 MR. SCHAGER: So what would happen? They end up  
6 with the -- with the rights of a creditor.

7 I promised you earlier that we'd try to walk  
8 through how the stock options worked in Enron.

9 THE COURT: I -- you can skip that.

10 MR. SCHAGER: Well, I'm going to get on the -- if  
11 I may, Your Honor, I would like to get on the record two  
12 facts involved there.

13 THE COURT: Go ahead.

14 MR. SCHAGER: One is that when an option is  
15 exercised, as we discussed earlier, there's a payment for it  
16 and there's an investment decision about whether to pay the  
17 exercise price. Again, an option that doesn't exist for RSU  
18 holders.

19 THE COURT: The investment decision is to go to  
20 work and stay for the five years in order to earn -- have  
21 the restriction of the stock fall away.

22 MR. SCHAGER: Well what was --

23 THE COURT: The payment is in labor and continued  
24 rendering of services as opposed to cash.

25 MR. SCHAGER: Now in Enron, Your Honor, it was not

1 the labor analysis that applied to the recipient the  
2 exercise price. The exercise price was a separate cash  
3 price. And Judge Gonzalez focused very specifically on  
4 that. Mr. Miller and I would refer to the same pages for  
5 the analysis. Okay? There's -- but there's certainly an  
6 exercise price in connection with getting the underlying  
7 stock.

8 Now in terms of what the employee got with his  
9 labor, and again that was Judge Gonzalez' analysis, they  
10 came to work and they got the stock options. Okay? And  
11 what did they get with the stock options? They got  
12 something that is statutorily recognized as a security.

13 We have searched, and I'm sure Your Honor will be  
14 searching, for a case that holds that instruments like these  
15 RSUs are securities under the Bankruptcy Code. We haven't  
16 found it and we don't think it exists, we don't think that  
17 any court has stretched the envelope that far to hold  
18 something in the nature of an RSU, a contract promise to pay  
19 you some day regardless of the currency you select --

20 THE COURT: A contract promise to pay you stock.  
21 A contract promise to pay you stock, not cash. A contract  
22 -- I can't say it enough times.

23 MR. SCHAGER: And I hear it every time, Your  
24 Honor., but --

25 THE COURT: It's a contract promise to pay you in

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1 stock, and the only thing that anybody put before me, which  
2 doesn't get me anywhere, is the statement from Neuberger  
3 Berman that says, oh, look, you're going to get cash.  
4 That's the only thing. And that arose in a unique situation  
5 in which Neuberger having entered Lehman was getting out  
6 alive from Lehman whole, and in order to keep the value the  
7 management decided to pay cash. That's not support for the  
8 general concept that equity meant cash. That's the only  
9 piece of paper anywhere that gives any indication that  
10 anybody ever was going to get or thought they were going to  
11 get cash for these. That's it.

12 MR. SCHAGER: I -- and I'll keep going back to it  
13 too, Your Honor, the question is what they did get and  
14 whether it falls within definition of a security --

15 THE COURT: Okay.

16 MR. SCHAGER: -- or whether it falls within --

17 THE COURT: Do you have any new --

18 MR. SCHAGER: -- the definition of --

19 THE COURT: Do you have any new points?

20 MR. SCHAGER: Whether it falls within the  
21 definition of a security or the definition of an equity  
22 security, and Your Honor, it doesn't fall within either one,  
23 and I think the case law supports us on that.

24 I think I'd like to address the hypothetical that  
25 the Court developed with Mr. Miller about the sale of a

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1 hotel, and I'm just going to address that briefly, but I  
2 think it illustrates what we're talking about.

3 If the seller of a hotel sells it with a contract  
4 promise to perform services over five years and get free  
5 rent, right, and then the purchaser goes into bankruptcy,  
6 well, the seller has still got his claim for the hotel,  
7 right?

8 THE COURT: It depends what the contract says. It  
9 depends what the contract says. Which is exactly my point.  
10 If the contract gives some backstop, sure. It all depends  
11 on what the contract says, so it doesn't really help to go  
12 through the hypothetical.

13 So we go back to the contract here and the  
14 contract resides in a combination of documents, the dear  
15 colleagues letter, the equity awards program, and all the --  
16 all the surrounding documents, and the contract here doesn't  
17 say that you have a guaranteed minimum. If at the time the  
18 RSU matures your stock is not worth at least as much as the  
19 price -- the Lehman market price today we'll make it up to  
20 you in cash. It doesn't say that. It could have said that;  
21 it didn't.

22 You're getting RSUs for this amount, here's the  
23 market price today, you divide the amount by the market  
24 price you get a number of shares. Those shares are going  
25 into a trust for you. In five years when you're still there

1       when those shares have increased in value that's what you  
2       get, that's income to you then, it's ordinary income.  
3       That's what the deal was.

4                    MR. SCHAGER: Your Honor, no.

5                    THE COURT: That -- do you -- you don't agree that  
6       that's what the deal was?

7                    MR. SCHAGER: You say the shares went into the  
8       trust, Your Honor?

9                    THE COURT: Yes.

10                  MR. SCHAGER: No.

11                  THE COURT: No?

12                  MR. SCHAGER: No. There's no evidence in the  
13       record of that.

14                  What happened was that over time Lehman would use  
15       the trust mostly when shared vested, which was not the same  
16       thing as the hold period, and over the -- over time Lehman  
17       would fund trust for some of the shares. We have no idea  
18       how many shares went into the trust, it was certainly not --

19                  THE COURT: But now --

20                  MR. SCHAGER: -- a one for one ratio with the  
21       RSUS.

22                  THE COURT: Okay. So now you're making --

23                  MR. SCHAGER: They would hedge their obligations  
24       --

25                  THE COURT: Now you're making --

1 MR. SCHAGER: -- to some degree.

2 THE COURT: Now you're making up a new argument,  
3 because now you're telling me this there was a fraud,  
4 because --

5 MR. SCHAGER: I absolutely did not say fraud, Your  
6 Honor --

7 THE COURT: Well --

8 MR. SCHAGER: -- I was correcting your factual  
9 assumptions, which I don't think is supported by the record.

10 THE COURT: Well in your -- when your -- when you  
11 submit your papers then you make -- then you issue findings  
12 on that point and I'll take those into consideration.

13 MR. SCHAGER: Okay.

14 THE COURT: Mr. Miller, you can respond.

15 Is there anything else you'd like to add other  
16 than the fact that you have not enjoyed our time together?

17 MR. SCHAGER: Your Honor, I've been delighted with  
18 our time together and I thank you for the patience you've  
19 shown over the last couple of days.

20 THE COURT: I -- this is -- this is spirited  
21 debate, which I greatly enjoy.

22 MR. SCHAGER: As do I, Your Honor.

23 THE COURT: Okay.

24 MR. SCHAGER: We both have focused on the legal  
25 process and we both have the statute in mind.

1 THE COURT: We do.

2 MR. SCHAGER: We obviously read it different ways,  
3 but I think we can both go back and read it again.

4 THE COURT: Sounds good. Thank you.

5 MR. SCHAGER: Thank you.

6 THE COURT: Who's next?

7 (Pause)

8 MR. BOYAJIAN: May it please the Court. Good  
9 afternoon, Your Honor, James Boyajian on behalf of seven  
10 claimants.

11 Your Honor, I had two points I would -- was  
12 planning on going through in order, which were again that  
13 there's no security or equity because there's no investment  
14 decision based on the 1933 Securities Act, Howie, and  
15 Daniel's line of cases, which we believe are highly relevant  
16 here and not in opposite.

17 If Your Honor will turn to Exhibit 4 of  
18 Mr. Schager's trial exhibit today you can see that the  
19 definition of the 33 Act, which far precedes the Bankruptcy  
20 Code's definition of security --

21 THE COURT: Okay. I'm not interpreting the 33  
22 Act, I'm interpreting the Bankruptcy Code.

23 MR. BOYAJIAN: Which is derived from the 33 Act  
24 and its line of cases --

25 THE COURT: I'm interpreting the Bankruptcy Code.

1       The Bankruptcy Code. The words in the Bankruptcy Code.

2       So --

3                    MR. BOYAJIAN: Which are further defined by  
4       securities cases that arose under the 33 Act, which is  
5       governing on the Bankruptcy Code's interpretation of the  
6       word security.

7                    THE COURT: Okay.

8                    MR. BOYAJIAN: Also to respond to Mr. Miller's  
9       comments earlier about there being --

10                  THE COURT: So --

11                  MR. BOYAJIAN: -- stock going to a trust -- yes.

12                  THE COURT: -- under your reading of this, under  
13       tab 4 RSU is not -- is not covered?

14                  MR. BOYAJIAN: That's correct. Under the cases  
15       interpreting the 1933 Act's definition of a security an RSU  
16       is not covered as a security.

17                  THE COURT: So there's a case that says an RSU is  
18       not a security?

19                  MR. BOYAJIAN: There's a case that says RSU  
20       holders do not have the same rights as stockholders, and  
21       that's the only case interpreting an RSU --

22                  THE COURT: Okay. But there -- but there's no  
23       case that says that under the 33 Act or the Bankruptcy Code  
24       an RSU is not a security.

25                  MR. BOYAJIAN: I believe --

1           THE COURT: I mean we will stipulate that an RSU  
2 holder does not have the same rights as a shareholder.

3 That --

4           MR. BOYAJIAN: Correct.

5           THE COURT: It says it in -- it says it in the  
6 documents, Lehman made no attempt to hide that fact from  
7 anybody.

8           But I'm asking you is there a case that says that  
9 a restricted stock unit is not a security?

10          MR. BOYAJIAN: There is not, Your Honor. This is  
11 an issue of first impression. The only case that comes  
12 close is the Fleet Boston case out of Massachusetts which  
13 interpreted the RSU -- the RSU instruments in that case  
14 under Delaware law.

15          THE COURT: Okay.

16          MR. BOYAJIAN: Which is also Delaware law is the  
17 law that governs these RSU instruments as well.

18          THE COURT: And what did Fleet Boston say?

19          MR. BOYAJIAN: It said that the RSU holders did  
20 not have the rights of stockholders. You can't -- you can't  
21 treat them the same way.

22          THE COURT: Okay. So my decision on this point is  
23 going to be it's a case of first impression as far as you're  
24 aware.

25          MR. BOYAJIAN: Yes, Your Honor; however, we do

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1 think the Daniel's decision is highly illuminating on this  
2 point in that the employees in the Daniel case came to --  
3 came to take their jobs for the sole -- I'm not -- sorry --  
4 not the sole purpose, but the primary purpose of being  
5 employed, having their career, having a job, not to be  
6 investors of their employer, and that's the situation here.  
7 These men and women were simply --

8 THE COURT: Well, Ms. Krieger -- Ms. Krieger gave  
9 very powerful testimony on this point. I mean she had an  
10 enormous personal stake, personal involvement, ownership  
11 interest, feeling of family toward the people she worked  
12 with toward Lehman Brothers. She recognized that part of  
13 her compensation was going to be come in the form of these  
14 stock units and she was unhappy about it, very unhappy about  
15 it, and that was earned by bitter experience.

16 Very wisely, and we've seen this happen more times  
17 than any of us care to, that employees' retirements get  
18 destroyed when a company goes into bankruptcy.

19 So she knew, and you know what she said? She said  
20 it was a time in my life, I didn't have a choice. I didn't  
21 like it, but I did it.

22 So I think that her choice was particularly  
23 wrenching because of her personal circumstances, but  
24 nonetheless she did it. The other witnesses they too made  
25 choices. They too made choices. Mr. Shotton decided to

1 move his family from Great Britain to the United States  
2 based on a piece of paper that told him in no uncertain  
3 terms you might get part of your compensation in a  
4 restricted stock unit.

5 There was -- there was no hiding the ball here,  
6 there was no bait and switch, it was a deal that each and  
7 every one of these folks accepted and were happy with until  
8 the cycle turned.

9 It's very sad. I -- it makes me sad, but you  
10 know, commerce relies on enforcing agreements as they're  
11 written. It relies on it, otherwise where are we?

12 And I will cite to you a case that was handed down  
13 two days ago by the District Court in which the District  
14 Court actually reversed in part Judge Peck's decision  
15 concerning the Lehman plan, and the Bankruptcy Court  
16 reversed the approval of the fees of certain professionals  
17 and made the following statement, "That bankruptcy judges  
18 are not entitled to tweak the law in order to suit the  
19 purposes of a particular case."

20 If I were -- if I were empowered to tweak the law  
21 you better believe I would tweak it to help people who  
22 suffer from unfortunate circumstances, but I don't have that  
23 power, I frankly wouldn't want that power.

24 So, you know, I don't know where we go with this  
25 argument that each of you keeps making.

1 MR. BOYAJIAN: We're not asking Your Honor to  
2 tweak the law, we're asking Your Honor to look at the entire  
3 universe of the law --

4 THE COURT: No, you're asking me to tweak --

5 MR. BOYAJIAN: -- which is far broader than  
6 bankruptcy.

7 THE COURT: -- the documents. You're asking me to  
8 tweak the --

9 MR. BOYAJIAN: Well let's look at one of the  
10 documents, Your Honor.

11 THE COURT: Sure.

12 MR. BOYAJIAN: Number 3 on Lehman's trial exhibit  
13 from the opening statement is an employment agreement with a  
14 redacted name.

15 THE COURT: Right, so this is one of these dear  
16 colleague letters, right?

17 MR. BOYAJIAN: Right.

18 THE COURT: Okay.

19 MR. BOYAJIAN: Okay. So taking the document --

20 THE COURT: Well this is an offer letter, right?  
21 Yeah, this is an offer letter.

22 MR. BOYAJIAN: Right.

23 THE COURT: Okay.

24 MR. BOYAJIAN: Which became the basis of the  
25 employment agreement.

1 THE COURT: Right. Uh-huh.

2 MR. BOYAJIAN: Okay. So the second paragraph  
3 about halfway through it says, "For the performance used  
4 years ending November 30, '99 and November 30, 2000 we will  
5 guarantee you a minimum total compensation of \$850,000."

6 THE COURT: Right.

7 MR. BOYAJIAN: Okay, that's a guarantee,  
8 unqualified guarantee.

9 THE COURT: Of compensation.

10 MR. BOYAJIAN: Of compensation.

11 THE COURT: Right.

12 MR. BOYAJIAN: But in a fixed liquid amount.

13 Now --

14 THE COURT: It -- you got to read the bullet  
15 points.

16 MR. BOYAJIAN: Well let's read the bullet points.

17 THE COURT: Sure.

18 MR. BOYAJIAN: Let's go to -- directly to the most  
19 relevant bullet point number 4. It says, "At the firm's  
20 option a portion of your total compensation" --

21 THE COURT: Right.

22 MR. BOYAJIAN: -- "may be payable in the form of  
23 restricted stock and pursuant to the firm's employee stock  
24 award program."

25 THE COURT: Yep.

1                   MR. BOYAJIAN: It doesn't say anything -- it  
2 doesn't include a -- a qualifying sentence before saying --  
3 or a portion of a sentence that would say notwithstanding  
4 the foregoing. In that if I were an employee trying to  
5 interpret this document I would -- I would understand that  
6 to mean that I'm guaranteed at least 850,000 in cash.

7                   THE COURT: You wouldn't be a very smart employee  
8 if that's what your reading was. And Mr. Shotton testified  
9 exactly the contrary. Mr. Shotton, who is a proverbial  
10 rocket scientist, okay, testified exactly the opposite. He  
11 knew what these words meant and he relied on the fact that  
12 the quote/unquote practice on the street was that it would  
13 shake out in a certain way and it would be 33 percent and he  
14 bought on.

15                  There's nothing in this document that says we  
16 guarantee you a minimum of \$850,000 in cash. In fact what I  
17 found so shocking frankly about this letter was it doesn't  
18 even say a portion of your total bonus. It says a portion  
19 of your total compensation. That's the part that frankly  
20 blew me away. That when you signed on to work for Lehman  
21 Brother you had, unlike -- unlike Ms. Stiefel who testified  
22 about a draw -- a guaranteed draw to help you get started,  
23 this letter gives you nothing. It gives you no guarantee of  
24 anything.

25                  MR. BOYAJIAN: I mean, Your Honor, it has a --

1 THE COURT: Do you understand?

2 MR. BOYAJIAN: -- it has a dollar sign which  
3 implies U.S. legal tender of \$850,000.

4 THE COURT: And with the words that say  
5 compensation. It doesn't say cash.

6 I mean I'm not going to beat a dead horse.

7 MR. BOYAJIAN: Again, Your Honor, there may be  
8 some ambiguity, especially for foreign employees who may  
9 have interpreted the word compensation to mean the word  
10 cash, especially when there's a dollar figure amount stated.  
11 So as I said in my opening, any ambiguity should be  
12 interpreted in favor of the employees given their -- their  
13 large disparity in the bargaining power here --

14 THE COURT: So it's your argument --

15 MR. BOYAJIAN: -- as well as the fact that Lehman  
16 was the sole drafter of this --

17 THE COURT: You're telling me that --

18 MR. BOYAJIAN: -- agreement.

19 THE COURT: -- your clients believed, got this  
20 letter and your clients believed that they were going to get  
21 850- -- a client of yours who got this letter expected  
22 \$850,000 in cash?

23 MR. BOYAJIAN: I believe some of them would have.  
24 I can't speak for them directly, but I can certainly see how  
25 it would be misconstrued that way.

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1 THE COURT: You would ask though wouldn't you? If  
2 you were moving your family from England wouldn't you ask?  
3 I'd want to be sure. I'd want to be sure before I moved by  
4 family from England what I was getting paid and how I was  
5 getting paid it. I don't think that I would move them  
6 unless I really understood all the details.

7 MR. BOYAJIAN: I'd like to move to my second  
8 point, Your Honor --

9 THE COURT: Sure.

10 MR. BOYAJIAN: -- about the wage laws, I think it  
11 ties into this line of questioning.

12 Earlier Ms. Alvarez brought up the Guiry case,  
13 which we believe is totally irrelevant here, because we  
14 never did argue that the RSUs are themselves the wages,  
15 which is what was at issue in this case.

16 We are arguing rather that there's a fixed  
17 guaranteed amount that was promised to the employees and  
18 that many labor laws and the public policies of other states  
19 and countries where those employees were based do apply and  
20 do preclude simply -- you know, simply forcing the employees  
21 to take what is effectively a forfeiture of their wages.

22 So I'd like to begin with New York Labor Law  
23 Section --

24 THE COURT: Give me -- give me an --

25 MR. BOYAJIAN: -- 193(b) --

1           THE COURT: Give me an illustration -- give me an  
2 illustration of that using a construction worker. What's a  
3 wage -- give me an illustration of that in ordinary, you  
4 know, someone who works at a big box store or a construction  
5 worker or any --

6           MR. BOYAJIAN: All right, let's go with the  
7 construction worker --

8           THE COURT: Okay.

9           MR. BOYAJIAN: -- making \$60,000 a year.

10          THE COURT: Okay.

11          MR. BOYAJIAN: The company would come to them and  
12 say, okay, we reserve the right at the firm's option to pay  
13 you part of your wages in cash and part in RSUs, and you  
14 won't be about to convert those.

15          THE COURT: No, no, no, that's just calling a  
16 construction worker someone who works at Lehman. I'm  
17 talking about real life. What's a real -- a real life wage  
18 claim is I worked --

19          MR. BOYAJIAN: Right.

20          THE COURT: -- you didn't pay me.

21          MR. BOYAJIAN: Right.

22          THE COURT: Right?

23          MR. BOYAJIAN: I rendered the services --

24          THE COURT: I rendered the services --

25          MR. BOYAJIAN: -- I received no consideration in

1 return.

2 THE COURT: -- and you didn't pay me.

3 MR. BOYAJIAN: Right.

4 THE COURT: We had a deal you were going to pay me  
5 \$20 an hour to build your garage.

6 MR. BOYAJIAN: Right.

7 THE COURT: I built the garage, you didn't pay me,  
8 right?

9 MR. BOYAJIAN: Right. So the company goes  
10 bankruptcy and then I have a 507(a) priority claim for my  
11 wages.

12 THE COURT: Right. Because the promise was to pay  
13 you in cash.

14 Here, if the employee had at the time of the  
15 filing it was in the middle of a payroll period and there  
16 were unpaid wages --

17 MR. BOYAJIAN: Uh-huh.

18 THE COURT: -- then that employee would have a  
19 priority claim for wages.

20 That's not this case. This case is about the  
21 stock. This is not a case under the Bankruptcy Code for  
22 wages.

23 MR. BOYAJIAN: Well, but they were again  
24 guaranteed a certain amount of pay and according to the New  
25 York Labor Law Section 193(b), which has two elements, you

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1 have to give written -- you have to obtain express written  
2 authorization from the employee and it has to be for the  
3 benefit of the employee. And case law has interpreted that  
4 second part has held that it can't be for the benefit of the  
5 employer. And we did have testimony to that effect from  
6 Ms. Krieger who did state on the record about the many ways  
7 that the RSU was designed and did benefit the company by  
8 keeping more cash for the general use of the company --

9 THE COURT: Right. So it --

10 MR. BOYAJIAN: -- and inflating its financial  
11 health to credit agencies and regulators.

12 THE COURT: So it benefited the company enabling  
13 it to stay -- keep in business and keep making money and  
14 keep paying all the claimants their salaries during those  
15 five-year periods and paying -- and allowing those claimants  
16 who had RSUs that had been held for five years to cash those  
17 in at the then prevailing very high market price of Lehman  
18 stock. But none of that was a benefit to any of the  
19 claimants, that was only a benefit to Lehman.

20 MR. BOYAJIAN: Yes, we believe so. It was  
21 primarily --

22 THE COURT: Okay. So it's your argument that the  
23 claimants, who by definition here, held RSUs in the run up  
24 to 2008 they got no benefit from this. It's an absurd --  
25 that's absurd, okay?

1 MR. BOYAJIAN: If I may, Your Honor.

2 THE COURT: I mean I'm trying to be patient.

3 MR. BOYAJIAN: Yes.

4 THE COURT: But it's absurd.

5 MR. BOYAJIAN: It's not a real benefit, because  
6 had they received cash instead of course the company  
7 reserved the right to pay either cash or RSUs and also  
8 reserved the right to amend the terms that --

9 THE COURT: So how about this, so how about --

10 MR. BOYAJIAN: -- unilaterally --

11 THE COURT: -- that -- so what you're saying is  
12 that was it a two-way deal? If you got one of these letters  
13 and it had -- and you got restrictive stock units, right,  
14 and then that stock value doubled over the five years,  
15 right, putting aside taxes, and then you got double the  
16 value. So you got \$50,000 of RSUs in year one, and in year  
17 five there were \$100,000. You're saying at that point the  
18 right thing to do would be to give the employee the \$50,000.  
19 I don't think the employee would want that. I think that  
20 employee wants that \$100,000 that they then pay tax on,  
21 albeit at the ordinary income rate, but they come out ahead  
22 even at a 30 percent marginal rate. They come out ahead.  
23 Of course it was a benefit to them as long as the -- as long  
24 as everything kept going. It was a benefit to them.

25 MR. BOYAJIAN: Your Honor is assuming that those

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1 same employees did not have the ability to take the same  
2 amount in cash and go, you know, to another investment  
3 agency and choose to invest their wages in a way that they  
4 saw more fitting or more beneficial to them.

5 So in fact this -- this was a detriment to them  
6 because they were given no investment decision. Their wages  
7 were simply withheld from them.

8 THE COURT: So when the person who received the  
9 letter that's Exhibit 3 or Mr. Shotton, for example, gets  
10 the letter, we're delighted to confirm our offer of full-  
11 time employment, your argument is that misreading this and  
12 misconstruing this as a promise of \$850,000 in cash they  
13 accepted employment.

14 Because if they understood what the letter said,  
15 which it clearly says, then they made their investment  
16 decision at that moment, which was to accept this  
17 compensation and make the investment decision that they  
18 would in essence invest themselves with Lehman for as long  
19 as they wanted to, and then until the five years went by  
20 they wouldn't get the stock. That's a decision.

21 MR. BOYAJIAN: But they were not choosing to  
22 invest in Lehman, Your Honor, they were coming to --

23 THE COURT: They were choosing to work at Lehman.

24 MR. BOYAJIAN: No, they were --

25 THE COURT: Were they choosing to work at Lehman?

1 MR. BOYAJIAN: They were choosing to continue  
2 their careers at Lehman.

3 THE COURT: Okay. Were they choosing to work at  
4 Lehman? Did anybody --

5 MR. BOYAJIAN: Yes.

6 THE COURT: Did anybody drag them into the  
7 building and chain them to a desk?

8 MR. BOYAJIAN: No.

9 THE COURT: They could have gone somewhere else,  
10 right?

11 MR. BOYAJIAN: Correct. However, they came to  
12 Lehman for the sole -- primary or sole purpose of continuing  
13 their careers and livelihood like as I cited the Howie case  
14 supporting earlier and that's no security.

15 THE COURT: And they decided -- they made a  
16 decision at that point, they weighed the pluses and the  
17 minuses and they decided to go to work for Lehman. It was a  
18 choice. Maybe it was a difficult choice, maybe as the years  
19 went by as they continued to look at the stock options it  
20 was a difficult choice, but if everyone does a cost benefit,  
21 if there was nothing better they didn't choose to leave.

22 MR. BOYAJIAN: To an earlier point about  
23 Mr. Shotton, Your Honor, it's actually not even my argument,  
24 it's his own testimony that he said if he was paid all in  
25 cash he would have had the ability to take that money and

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1 decide wherever he wanted to put that money and he would  
2 have probably decided not to buy Lehman stock.

3 THE COURT: Okay. And he should --

4 MR. BOYAJIAN: So it was a detriment. Under the  
5 New York Labor Law this is not for the benefit of the  
6 employee, it's for the benefit of the employer, and  
7 therefore it is a violation, an unlawful withholding of  
8 wages against the laws and public policies of the State of  
9 New York and it's -- as a result it's void as a matter of  
10 law. It is not rescission. We are not asking for an  
11 agreement or an order by the Court deeming these agreements  
12 void as -- I'm sorry -- deeming these agreements to be  
13 rescinded, we are asking the Court to recognize what the law  
14 already does recognize in that this was not for the benefit  
15 of the employees, it was simply for the benefit of the  
16 employer, and there's case law cited in our briefs to that  
17 effect. And to simply recognize that the law holds these  
18 kinds of contracts void as a matter of law --

19 THE COURT: Okay. So if they're void then what?  
20 If they're void what's the remedy?

21 MR. BOYAJIAN: Then -- then the remedy is either  
22 the alternative performance obligation to pay in cash --

23 THE COURT: There is no alternative performance  
24 obligation to pay in cash. That's made up. There is no  
25 alternative obligation to pay in cash. It doesn't say

1 anything about an alternative obligation to pay in cash.

2 MR. BOYAJIAN: Well at any time Lehman could have  
3 just cashed out these employees, and they reserved the right  
4 to amend the terms at any time unilaterally. So they could  
5 have changed the terms in --

6 THE COURT: There was no --

7 MR. BOYAJIAN: -- a subsequent year saying, well,  
8 we're going to give you cash now.

9 THE COURT: There was no -- there was no  
10 alternative performance requirement. Lehman very clearly  
11 said in the firm's discretion we're going to pay you this  
12 way or that way. It's a black box. That's what you were  
13 told, that's what you accepted. So you can't now say that  
14 it's void and that therefore you pay us in cash.

15 MR. BOYAJIAN: I will let Ms. Solomon --

16 THE COURT: Sure.

17 MR. BOYAJIAN: -- follow up on the alternative  
18 performance --

19 THE COURT: Okay.

20 MR. BOYAJIAN: -- arguments further; however, I'd  
21 like to add one alternative remedy.

22 If it's void as a matter of law then you're  
23 entitled to restitution, Your Honor. Not rescission,  
24 restitution to be put in the same position that you would  
25 have been had the invalid and unlawful contract never been

1 entered into.

2 And I want to remind the Court that each of these  
3 agreements changed year to year, it wasn't the same  
4 agreement. So the fact that they got the benefit --

5 THE COURT: And every year --

6 MR. BOYAJIAN: -- of that plan in general, you  
7 know, seven or ten years ago is irrelevant to the now --

8 THE COURT: And do you remember the --

9 MR. BOYAJIAN: -- modified version of the  
10 agreement.

11 THE COURT: Do you remember the part about how  
12 they were at will employees?

13 MR. BOYAJIAN: Yes.

14 THE COURT: So every year they had a new decision  
15 that they could make. So if somehow the first year they had  
16 a misunderstanding that they thought they were going to get  
17 all cash and then you get to the second year and it didn't  
18 happen or they didn't like the spread, they didn't like how  
19 the bonus was allocated between cash and stock once again  
20 they could have left, but they didn't year after year after  
21 year. And everything was fine until the sky fell in  
22 September of 2008.

23 MR. BOYAJIAN: Right.

24 THE COURT: And that's what happened here, and  
25 it's very sad, but it's not --

1                   MR. BOYAJIAN: They didn't leave for a number of  
2 reasons.

3                   THE COURT: -- an occasion to rewrite all of these  
4 documents and to recreate everybody's understanding and what  
5 they relied on and how they acted in reliance on that  
6 understanding.

7                   MR. BOYAJIAN: Finally those -- the other element  
8 in the labor law of New York which requires express written  
9 authorization.

10                  As we know, Your Honor, the subordination clause  
11 was removed from later years beginning in 2005, so not only  
12 did they not give the notice and not disclose that material  
13 term, but they actually had it in earlier and they decided  
14 to take it out.

15                  THE COURT: We've been through this. There's very  
16 little indication that anybody noticed that, relied on that,  
17 and there's no testimony whatsoever about what they in fact  
18 meant. And agreements are always subject to applicable law.  
19 And the fact that that was taken out remains a mystery, but  
20 there's been no evidence that anybody at that point then was  
21 misled into believing that that meant that they then had a  
22 claim for cash. There's just no evidence of that, nothing.  
23 There's no evidence of that.

24                  It's fine to go back after the fact and comb  
25 through all the documents and construct an argument, but it

1 really has nothing to do with the affect of applicable law  
2 on the documents that are made subject to applicable law.

3 MR. BOYAJIAN: One final comment and I promise  
4 I'll wrap up, Your Honor.

5 If the Court decides to uphold these RSU  
6 agreements as valid under the wage laws and valid  
7 enforceable agreements then will employees really have the  
8 right to vote with their feet when every investment bank  
9 adopts this policy, this kind of plan? Not only every  
10 investment bank, but what if this becomes a trend across  
11 pretty much any industry?

12 I myself counsel corporations, and so what I would  
13 do if this is upheld is I would turn around to my  
14 corporation clients and I would instruct them to issue RSUs  
15 instead of actual common stock, stock options, anything that  
16 gave any investment decision to the employee, because simply  
17 we all know that, and it was on the record, that employee  
18 compensation is a large chunk of the --

19 THE COURT: Are you making any claim --

20 MR. BOYAJIAN: -- cost of a business.

21 THE COURT: -- that these folks didn't receive  
22 minimum wage? You're not making any claim that these folks  
23 didn't receive minimum wage are you?

24 MR. BOYAJIAN: No, we're not.

25 THE COURT: No, they made a lot more than minimum

1 wage, right?

2 MR. BOYAJIAN: But they were -- all their claims  
3 -- for example, I have a client in New Jersey, Mr. Kasupley  
4 (ph) who was an IT programmer, I believe he was making  
5 something in the ballpark of 50- to \$60,000 and he only  
6 started working for Lehman two years before the bankruptcy.  
7 So yes, two years accrued RSUs in the amount of about 6,000  
8 or so -- 6,000 to \$7,000 and he is an immigrant from Italy  
9 and he may not necessarily have understood all the terms of  
10 this --

11 THE COURT: Look, you know, we can't be all  
12 things --

13 MR. BOYAJIAN: -- agreement.

14 THE COURT: -- to all people, okay?

15 MR. BOYAJIAN: Well, but debtor wanting the treat  
16 all the people --

17 THE COURT: So -- okay, so you advise your  
18 corporations then that every time they want to hire an  
19 employee you better bring them in for a four-week course and  
20 we better make sure they understand ever word of English,  
21 ever provision of the Internal Revenue Code, every provision  
22 of the Bankruptcy Code. It's an absurd position. It's an  
23 absurd position.

24 This is not about a case of illiterate immigrants  
25 who were duped into become employees and then not paid a

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1 decent working wage. That's not what this case is about.

2 MR. BOYAJIAN: Right. But the RSUs did not give  
3 them any actual equity stake in the company.

4 THE COURT: If every investment bank -- it doesn't  
5 matter. If the dear colleague letter had said at our option  
6 we're going to pay you in Monopoly money, we're going to pay  
7 you in gift certificates to a fast food restaurant, it  
8 doesn't matter. As long as the unit of composition was not  
9 illegal and the employee accepted it it doesn't matter.

10 So in your hypothetical if every investment bank  
11 and every corporation decides that it wants to partially pay  
12 its employees in some stock like instrument they can do  
13 that, and if an employee doesn't want to work there they can  
14 go work somewhere else.

15 That's just the -- I just don't understand how  
16 anyone could take any other position in this type of a case.  
17 We're not talking about -- we're not talking about slave  
18 labor, we're not talking about working in bad conditions for  
19 below minimum wage. We're talking about a voluntary  
20 decision to work for a lot of money at a prominent  
21 investment bank, period.

22 The bank failed, we know that, everyone is sorry,  
23 maybe people should have gone to jail, it is what it is.  
24 That's not my job. My job is to continue to help wind down  
25 this estate, and that's what I'm going to do.

1                   So I just find your examples not persuasive.

2                   MR. BOYAJIAN: In closing, Your Honor, I'd just  
3 like to say that because it became impossible to deliver the  
4 actual stock certificates and give the holders of the RSUs  
5 any equity interest whatsoever in the company the result is  
6 that they should be returned to the full payment of their  
7 services, and that's --

8                   THE COURT: Did you -- did you hear Mr. -- did you  
9 hear Mr. Miller indicate then in fact they do have the  
10 shares that are --

11                  MR. BOYAJIAN: We disagree on the fact -- factual  
12 -- there's a factual dispute here. Mr. Miller has stated  
13 that there were shares underlying the RSUs at all times. We  
14 have not -- we do not believe that is accurate, Your Honor.  
15 We -- what we understand --

16                  THE COURT: Well --

17                  MR. BOYAJIAN: -- is that the RSU trust existed  
18 and the shares would be placed in that trust three years  
19 later when the RSUs vested. Okay?

20                  THE COURT: Okay. And then Mr. --

21                  MR. BOYAJIAN: So three years --

22                  THE COURT: -- Mr. Miller today --

23                  MR. BOYAJIAN: So for three years there was no --

24                  THE COURT: Mr. Miller --

25                  MR. BOYAJIAN: -- stock underlying the RSUs.

1           THE COURT: Mr. Miller today indicated that the  
2 restrictions fell away at the moment of the bankruptcy and  
3 that the full amount of the RSUs now exists in the form of  
4 stock with -- for each of these claimants. That's what I  
5 believe he said this morning. So that --

6           MR. BOYAJIAN: On what basic? We haven't seen any  
7 document or any contractual language to that effect.

8           THE COURT: Well, we can --

9           MR. BOYAJIAN: That's unfounded.

10          THE COURT: Mr. Lemons?

11          MR. LEMONS: May I clarify, Your Honor, just --

12          THE COURT: Sure.

13          MR. LEMONS: Not to inject myself into the debate,  
14 but the plan provides that holders of equity will retain the  
15 economic rights that they would have had as equity, because  
16 that's what Mr. Miller was referring to when there was an  
17 actual physical piece of paper issued as stock are not as  
18 relevant.

19          THE COURT: Right. But the point is that if  
20 somebody had -- the question is that at the moment of the  
21 bankruptcy if somebody had \$5 million of RSUs --

22          MR. LEMONS: Under --

23          THE COURT: -- or -- using an amount is the wrong  
24 thing to do. Shares. Shares. Then does that person now  
25 have that -- a proportionate number of shares based on the

1 then outstanding number of shares?

2 MR. LEMONS: If our objection is granted, Your  
3 Honor, to their claims, and they are reclassified as equity  
4 as we have asked the Court to do --

5 THE COURT: Yes.

6 MR. LEMONS: -- they will end up with a percentage  
7 of the economic rights to the equity of the company --

8 THE COURT: That --

9 MR. LEMONS: -- equivalent to what they would have  
10 received if the RSUs had been converted into shares.

11 THE COURT: Okay. Thank you.

12 So your last statement is what happens under the  
13 plan? You --

14 MR. BOYAJIAN: Would you like me to respond, Your  
15 Honor?

16 THE COURT: Sure. Go ahead.

17 MR. BOYAJIAN: What happens under the plan is --  
18 okay, so assuming you're a commissions salesperson, for the  
19 first ten months you render services, you get nothing in  
20 return. In November they finally give you stock options --  
21 I'm sorry -- restricted stock units, okay? So --

22 THE COURT: Yeah.

23 MR. BOYAJIAN: -- between January and November  
24 you've gotten nothing in exchange. In November they give  
25 you the RSUs. Three years from the -- from January you then

1 get vesting rights. Okay, the RSUs vest.

2 THE COURT: Uh-huh.

3 MR. BOYAJIAN: And that's when the voting rights  
4 kick in because the share is actually placed in the trust,  
5 which then gives the trustee the right -- the ability to  
6 send you a proxy and give you the right to vote, and that's  
7 also when we understand dividend equivalence begin accruing.  
8 So it's not until three years later that you have some  
9 attenuated right to possible equity in the company. But  
10 again, that can all be forfeited, that -- you know, and even  
11 the dividend equivalents are not really dividends, they're  
12 more -- they're simply more RSUs. The CSA holders actually  
13 had no voting rights whatsoever.

14 THE COURT: I'm not interested in this point. I'm  
15 not interested in this point. I am interested in a response  
16 to the fact that at the moment -- if this motion is granted  
17 you get the stock attributable to the RSUs that you had at  
18 the moment of the bankruptcy filing irrespective of the  
19 fulfillment of the vesting conditions. You get it whether  
20 or not the five years had gone by or not. You have what  
21 the --

22 MR. BOYAJIAN: There was an intervening bankruptcy  
23 event which caused the impossibility to deliver the stock  
24 options.

25 THE COURT: Okay.

1 MR. BOYAJIAN: All right.

2 THE COURT: Thank you.

3 MR. BOYAJIAN: Thank you, Your Honor.

4 THE COURT: Who's next?

5 Go ahead, Ms. Solomon.

6 MS. SOLOMON: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MS. SOLOMON: I just want to very, very briefly  
9 respond to one point you raised --

10 THE COURT: Okay.

11 MS. SOLOMON: -- with Mr. Schager --

12 THE COURT:

13 MS. SOLOMON: -- and that has to do with the right  
14 to convert under 101-16.

15 THE COURT: Okay.

16 MS. SOLOMON: I believe that the RSUs provides a  
17 right to convert to stock, as we've submitted to the Court,  
18 and the way that it's converted -- it doesn't automatically  
19 convert, Your Honor -- the way it is converted is by the  
20 employee performing the services and satisfying the  
21 conditions, and without the employee doing that the RSU will  
22 not convert. It's not a situation that it automatically  
23 converts five years later without any action on the part of  
24 the employee.

25 THE COURT: Okay.

1 MS. SOLOMON: As to the alternative performance  
2 argument, Your Honor, we've submitted that there were  
3 alternative performance obligations of Lehman here, and the  
4 alternative performance obligation consists of their  
5 obligation to pay in cash.

6 THE COURT: Where does -- where does it say that?

7 MS. SOLOMON: Your Honor, any employment contract  
8 that an employer enters into with its employee provides for  
9 payment of compensation, and in this case Lehman provided  
10 the terms under which they could pay their compensation,  
11 and they said at our discretion we can implement this  
12 procedure --

13 THE COURT: Okay.

14 MS. SOLOMON: -- that we have for the --

15 THE COURT: At our discretion we can pay you --

16 MS. SOLOMON: -- RSUs.

17 THE COURT: -- not in cash.

18 MS. SOLOMON: Right.

19 THE COURT: That's what it said.

20 MS. SOLOMON: And if they didn't do that then how  
21 is it going to get paid? In cash. That's the only other  
22 way it can be get paid.

23 THE COURT: But where -- where does it say that?

24 MS. SOLOMON: Well what, they're going to get paid  
25 in funny money? No, obviously they're going to get paid in

1 cash. That's -- I mean it's --

2 THE COURT: It's a pretty big -- it's a pretty big  
3 leap.

4 MS. SOLOMON: I don't think so, Your Honor.

5 THE COURT: It doesn't say that, Ms. Solomon. It  
6 doesn't say that.

7 MS. SOLOMON: Well --

8 THE COURT: It doesn't say that in the event -- I  
9 mean the fallacy in this -- in this line of argument is that  
10 if Lehman had been rescued by the government on  
11 September 14th, 2008 and survived and the share price stayed  
12 at a couple of pennies --

13 MS. SOLOMON: Uh-huh.

14 THE COURT: -- then your argument goes away and  
15 you would have to then make the argument that well, it  
16 really meant that if the stock wasn't as worth as the  
17 notional amount of the compensation you have to top it up in  
18 cash. It doesn't say that.

19 MS. SOLOMON: No, I'm not talking about cash --

20 THE COURT: Sure you are.

21 MS. SOLOMON: -- that backstopping the RSU, I'm  
22 not taking at that. I'm saying --

23 THE COURT: So let me --

24 MS. SOLOMON: -- there's just two options here.

25 Any --

1 THE COURT: But where does it say --

2 MS. SOLOMON: -- rational employee --

3 THE COURT: Where --

4 MS. SOLOMON: Any rational employee reading an  
5 employment agreement when they get terms laid out to them --  
6 put aside the issue of whether they're going pay them in  
7 RSUs or equity or whatever -- when somebody gets an  
8 employment contract and it says we're going to pay you --  
9 and I'm going back to this employment agreement that we  
10 referred to throughout these proceedings, okay? And, you  
11 know, anybody -- if that clause was not in there about that  
12 at our option we could pay you in another form and if  
13 everything else was the same --

14 THE COURT: Well you can't -- but you can't say  
15 that, that's --

16 MS. SOLOMON: No, no, no --

17 THE COURT: -- that's the --

18 MS. SOLOMON: -- just please allow me, Your Honor,  
19 just -- I'm trying --

20 THE COURT: That's the whole point of the  
21 agreement. That --

22 MS. SOLOMON: But -- you're saying to me how --  
23 what is the alternative performance that it's in cash? Well  
24 if they don't pay them in the form of RSUs or equity how  
25 else would they get paid, Your Honor?

1           THE COURT: That's an absurd hypothetical. This  
2 letter says here's your compensation. You're going to get  
3 this much salary, you're going to get this much bonus, and  
4 at the firm's option some of all of that --

5           MS. SOLOMON: Right.

6           THE COURT: -- can be paid not in cash. That's  
7 what it says.

8           MS. SOLOMON: Right, exactly. Exactly, Your  
9 Honor. Not in cash. So if it doesn't get paid in the RSUs  
10 or the equity, however they want to pay it out, it gets paid  
11 in cash. That's an alternative performance --

12          THE COURT: They got the --

13          MS. SOLOMON: -- obligation.

14          THE COURT: They got the RSUs.

15          MS. SOLOMON: Your Honor, you're not letting me --

16          THE COURT: They got them.

17          MS. SOLOMON: -- you're not -- I understand they  
18 got the RSUs and the performance on the RSUs was rendered  
19 impossible.

20          THE COURT: Okay.

21          MS. SOLOMON: That's the point, okay?

22          MS. SOLOMON: So there's alternative performance  
23 obligations, and the case law that we cite in our brief  
24 supports that proposition. The case of Draiken versus  
25 Avondale (ph), in that case there was a contract that

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1 provided at the discretion of Avondale this may be paid in  
2 cash or in whole or in part and the equivalent percentage of  
3 working interest in acquired oil and gas fields. So the oil  
4 and gas fields something happened to them and they couldn't  
5 be issued so the -- that was the facts of the case, Your  
6 Honor, okay?

7 And so the -- so the promisor said, well, I can't  
8 deliver, and the court said, well, I'm sorry, that's too  
9 bad, because the essence of the obligation, even though it  
10 was in your discretion, was that there was going to be  
11 payment of compensation. It was either going to be in cash  
12 or in the equivalent percentage of the acquired oil and gas  
13 fields. So if you can't deliver the required oil and gas  
14 fields so guess what, now you have to pay in cash.

15 THE COURT: It's not -- it's not this case. I've  
16 listened to this for three days now. It's not this case.

17 Let me ask you a different hypothetical.

18 MS. SOLOMON: Sure.

19 THE COURT: Suppose that an employee of Lehman  
20 Brothers was told we're going to pay you \$200,000 for the  
21 year, cash, all cash.

22 MS. SOLOMON: Right.

23 THE COURT: Okay? And we're going to pay it to  
24 you on January 1st --

25 MS. SOLOMON: Uh-huh.

1           THE COURT: -- in arrears -- we're going to pay  
2        you in arrears. What I'm trying to set up and I'm too tired  
3        to do it frankly particularly well, is the hypothetical  
4        where as of the moment of the filing, okay, you have unpaid  
5        cash wages --

6           MS. SOLOMON: Right.

7           THE COURT: -- of \$200,000, okay? We're in  
8        bankruptcy now.

9           MS. SOLOMON: Uh-huh.

10          THE COURT: Lehman promised to pay you \$200,000 in  
11        cash wages. What happens?

12          MS. SOLOMON: You get a claim.

13          THE COURT: For what?

14          MS. SOLOMON: \$200,000.

15          THE COURT: You get \$200,000?

16          MS. SOLOMON: No, you get --

17          THE COURT: No, you get --

18          MS. SOLOMON: -- like any other unsecured creditor  
19        --

20          THE COURT: You get like any other --

21          MS. SOLOMON: -- which is what --

22          THE COURT: Right.

23          MS. SOLOMON: -- which is what we're asking for.

24          THE COURT: You get -- right. You get like any  
25        other -- no, no, no. What you're asking for is for the

1 stock attributable to the RSUs to be worth the amount of the  
2 cash.

3 MS. SOLOMON: Well, that begs the question.

4 THE COURT: So if you had --

5 MS. SOLOMON: Right?

6 THE COURT: -- you're not -- that's what you're  
7 asking for.

8 So in the hypothetical I gave you if you match  
9 that up to with what you're asking for here you're saying I  
10 worked for \$200,000, I get \$200,000, I don't care about this  
11 bankruptcy thing. I want --

12 MS. SOLOMON: I'm certainly not saying that, Your  
13 Honor.

14 THE COURT: Well, but that's what --

15 MS. SOLOMON: And I'm sorry if that's the  
16 impression that came across to the Court.

17 THE COURT: But that's what you're -- that's what  
18 your claim is for. Your claim is for we just heard all this  
19 argument that it was for compensation of \$850,000. The  
20 gripe here is that the RSUs are not worth that amount of  
21 money and you want the cash instead.

22 MS. SOLOMON: Well, the issue -- the issue is --  
23 and you may disagree, Your Honor -- but the issue is are  
24 there alternative performance obligations? And I don't  
25 think you accept that.

1 THE COURT: I don't.

2 MS. SOLOMON: But assuming that you did, just for  
3 a moment, okay, then wouldn't they be entitled to the cash  
4 obligation?

5 THE COURT: No.

6 MS. SOLOMON: Logically --

7 THE COURT: No.

8 MS. SOLOMON: -- under alternative performance law  
9 I think they would, Your Honor.

10 THE COURT: No, they would not.

11 MS. SOLOMON: And, you know, the  
12 recharacterization of the claims here as equity and giving  
13 them the treatment of equity holders under the plan does not  
14 respond to that issue and does not answer their question,  
15 and the RSU trust, which we spent some time this morning on,  
16 goes to that issue as well. We went through a number of  
17 clauses in the RSU trust itself which recognizes the rights  
18 of the participants in the plan, which these claimants are,  
19 as general unsecured creditors.

20 THE COURT: That's not -- the words are there but  
21 that's not the best reading of the documents.

22 MS. SOLOMON: Well, I can only rely on the words,  
23 Your Honor, and the point is that it recognizes them as  
24 general unsecured creditors, and I heard somebody say this  
25 morning, well, to be able to compel the right to issue the

1 shares. Is that correct? Something like that?

2 THE COURT: Something like that.

3 MS. SOLOMON: Along those lines? But isn't the  
4 point that when there's a general unsecured creditor they  
5 have a claim as to all of the assets of the estate and there  
6 is nothing --

7 THE COURT: That's not --

8 MS. SOLOMON: -- nothing in any of these documents  
9 that restrict them solely as to the shares. In fact the  
10 trust does exactly to the contrary and says, you are a  
11 general unsecured creditor no better than any other general  
12 unsecured creditor of the estate.

13 I think that's what the trust says, Your Honor,  
14 but you have the provisions before you and I think we spent  
15 sufficient time this morning, but that -- I think that is a  
16 fair interpretation and the correct interpretation of the  
17 trust language.

18 THE COURT: So -- so even though it hasn't been  
19 shown that any of the claimants saw that document and relied  
20 on it that you get to rest your argument on that, but that's  
21 not the same way we apply the rules with respect to the  
22 removal of the bankruptcy language --

23 MS. SOLOMON: Well, I'll get to that in a moment.

24 THE COURT: -- in the document.

25 No, but you -- in other words you want to use as a

1 sword the fact that the 1997 agreement said this, that, and  
2 the other thing, even though none of the claimants knew  
3 about that, but you don't want to concede that the  
4 bankruptcy laws apply and are applicable even though none of  
5 the claimants had knowledge of it. In fact you're saying  
6 the opposite, that because they weren't told the bankruptcy  
7 implications that therefore they can't be held to them.

8 So you --

9 MS. SOLOMON: I -- I don't think one has --

10 THE COURT: -- want to have it --

11 MS. SOLOMON: -- to do with the other, and I heard  
12 Lehman's --

13 THE COURT: Well, you want --

14 MS. SOLOMON: -- counsel this morning talking  
15 about the fact that the trust was not publicized to the  
16 claimants, obviously trying to distance themselves from the  
17 damaging language in the trust itself, but I don't think  
18 it's the general tenor of contract law that whether somebody  
19 knows or does not know about a contract that is going to  
20 affect the interpretation of the contract.

21 THE COURT: Right. And whether or not somebody --

22 MS. SOLOMON: And the contract exists.

23 THE COURT: Exactly.

24 MS. SOLOMON: And the fact of the matter also --

25 THE COURT: And whether or not somebody knows

1 about the existence and operation of the bankruptcy laws  
2 doesn't affect how the rights that they're granted --

3 MS. SOLOMON: Well --

4 THE COURT: -- exist.

5 MS. SOLOMON: -- under the wage laws that might  
6 not be correct.

7 But I think that as to the trust agreement itself  
8 it is clear that the trust was expressly referred to in all  
9 of the RSU program documents year after year after year  
10 after year, and it seems like this document got buried away  
11 in the 30,000 pages or documents that were provided in the  
12 data repository, the very complex document production system  
13 that was set up by Lehman --

14 THE COURT: So the whole -- the whole thing --

15 MS. SOLOMON: -- and there was only one single  
16 copy of this document.

17 THE COURT: Okay, great, so the whole thing was  
18 the big fraud.

19 MS. SOLOMON: I didn't say it was a fraud, but I  
20 think that --

21 THE COURT: Because you don't want to say it's a  
22 fraud because then we're back into the fact that a fraud  
23 related to securities get subordinated under 510(b), so --

24 MS. SOLOMON: Your Honor, I'm not suggesting it's  
25 a fraud, I think you are, but --

1 THE COURT: Well --

2 MS. SOLOMON: -- but --

3 THE COURT: Well because you don't want to own it.

4 You want to say --

5 MS. SOLOMON: No.

6 THE COURT: -- that there's a secret document that  
7 Lehman buried away in a drawer --

8 MS. SOLOMON: They don't like it.

9 THE COURT: -- and that -- pardon me?

10 MS. SOLOMON: They don't like it.

11 THE COURT: And they don't like it, so they --

12 MS. SOLOMON: That's not fraud though.

13 THE COURT: That's not fraud? They form a  
14 trust --

15 MS. SOLOMON: No, they produced it. They produced  
16 it and I have it right here.

17 THE COURT: They form a -- if you don't mind.

18 They form a trust, right, and then they build an  
19 equity -- an equity award program, and secretly they know  
20 that what they're really doing is giving people something  
21 called equity that's really debt. So they do that for years  
22 and years and years and years, and then in the context of  
23 this litigation or whatever, someone finds that document  
24 from 1997 and says, ah ha, Lehman knew all along that this  
25 was -- that these folks were getting something that was the

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1 same thing as the right of a general creditor. That kind of  
2 sounds like a fraud to me.

3 MS. SOLOMON: I'm not making that argument, Your  
4 Honor.

5 THE COURT: Okay.

6 MS. SOLOMON: What I'm saying is that we're  
7 entitled to rely on Lehman's own contract documents that it  
8 drafted --

9 THE COURT: Okay.

10 MS. SOLOMON: -- itself. And that were  
11 specifically referred to in all of the RSU program  
12 documents.

13 THE COURT: Okay.

14 MS. SOLOMON: Your Honor, as to the removal of the  
15 bankruptcy clause it's been suggested that the subordination  
16 clause in the RSU itself was merely a statement of law, but  
17 I don't agree with that characterization. Namely for the --  
18 primarily for the reason that in the statement about -- or  
19 the clause that was actually included in the RSU agreements  
20 itself it referred to the claims that would arise from --  
21 and I don't have the language exactly correct -- but you  
22 know, the failure to deliver shares or whatever it is, would  
23 be deemed to be a claim for purposes of 51099(b). And it's  
24 clear that what they were trying to do was get effectively a  
25 subordination agreement in the RSU agreement itself by using

1 the language that it would be deemed.

2 And in fact Lehman's argument has evolved over the  
3 course of these proceedings and it claims now that, well  
4 it's not -- you know, it's not -- it's not a subordination  
5 agreement, just a statement of the law, but in fact earlier  
6 in these proceedings Lehman did rely on 510(e) -- 510(a) of  
7 the Bankruptcy Code, although they appear not to be relying  
8 on it anymore. I expect because there was -- you know,  
9 there was no disclosure to the employees other than the  
10 inclusion in the document itself with regard to that  
11 specific clause, and they apparently by inclusion of the  
12 clause in the RSU agreement itself considered it necessary,  
13 maybe clarifying of their rights.

14 THE COURT: You're making that up. You're making  
15 that up. You --

16 MS. SOLOMON: Well, they put it in, Your Honor.

17 THE COURT: -- have no -- you have no idea why the  
18 clause was in there and why it was removed. And Mr. Miller  
19 very candidly said that he didn't either. So you don't  
20 know. You're just --

21 MS. SOLOMON: Well --

22 THE COURT: You're just asking for an inference.

23 MS. SOLOMON: That they considered it necessary in  
24 their agreement?

25 THE COURT: You can't tell -- you can't stand

1 there and tell me what Lehman considered.

2 MS. SOLOMON: Well --

3 THE COURT: You --

4 MS. SOLOMON: -- if somebody -- if somebody --  
5 people don't generally put superfluous clauses in their  
6 agreements, correct?

7 THE COURT: Lawyers put superfluous clauses in  
8 agreements all the time.

9 You cannot stand there and testify and tell me  
10 what Lehman was thinking. You can tell me --

11 MS. SOLOMON: I don't --

12 THE COURT: -- that I can draw an inference, but  
13 you cannot tell me what Lehman -- why Lehman did what it  
14 did.

15 MS. SOLOMON: No, and I didn't -- I didn't -- and  
16 if my words were not chosen exactly in that manner, you  
17 know --

18 THE COURT: Okay.

19 MS. SOLOMON: -- I withdraw that point.

20 THE COURT: Okay.

21 MS. SOLOMON: But, Your Honor, you may infer --

22 THE COURT: I'm a stickler. Yes.

23 MS. SOLOMON: You may infer --

24 THE COURT: Okay.

25 MS. SOLOMON: -- that they considered it necessary

1 or clarifying with regard to --

2 THE COURT: Okay. But we have --

3 MS. SOLOMON: -- what the rights --

4 THE COURT: -- we have no evidence.

5 MS. SOLOMON: That's right, and we don't need to  
6 speculate, but the evidence that we do have -- and I don't  
7 think it is appropriate for us to speculate -- but the  
8 evidence that we do have, Your Honor, is that they put it in  
9 at one point and then two years later or with regard to this  
10 litigation, I don't know when it went in exactly, but two  
11 years later forever more they took that clause out.

12 THE COURT: But wait, this -- they didn't remove  
13 it in response to this litigation.

14 MS. SOLOMON: No, no, no. I didn't mean to  
15 suggest that, but for 2003 and 2004 --

16 THE COURT: Right.

17 MS. SOLOMON: -- the clause was in there, and  
18 then --

19 THE COURT: Right. But you know -- you know the  
20 doctrine of evidence that says subsequent repairs are not  
21 admissible evidence of a prior defect? I mean --

22 MS. SOLOMON: Yeah, but we have -- we have an RSU  
23 agreement for each year.

24 THE COURT: I --

25 MS. SOLOMON: And I know that much of their

1 argument is based upon what was the prior practice for all  
2 the -- all the years.

3 THE COURT: Okay. I --

4 MS. SOLOMON: I think that's the heart of their  
5 argument. This was the practice and was ongoing.

6 THE COURT: Okay.

7 MS. SOLOMON: So I think -- I think it is  
8 appropriate to look at what they did in 2003 and 2004 versus  
9 the subsequent years, and we know that --

10 THE COURT: But the law --

11 MS. SOLOMON: -- forever more they took out the  
12 subordination clause. And generally when --

13 THE COURT: Well, no, it's not a --

14 MS. SOLOMON: -- somebody --

15 THE COURT: -- it's not a subordination clause,  
16 it's language relating to bankruptcy. It's not -- it's not  
17 -- we're not talking about a subordination agreement, we're  
18 just talking about language relating to bankruptcy.

19 MS. SOLOMON: I think -- I think it is a  
20 subordination agreement because it says that your claims  
21 arising under this will be deemed to be --

22 THE COURT: Right. That's not --

23 MS. SOLOMON: -- claims for purposes of 510(b),  
24 not that they are --

25 THE COURT: That's not --

1 MS. SOLOMON: -- they want the consent of the  
2 claim holders that these are going to be considered claims  
3 and then therefore they're forever estopped from making an  
4 argument to the contrary. That sounds to me like it's a  
5 subordination agreement.

6 THE COURT: No, now that's making it up. That's  
7 making it up. That's not -- that's not -- you just got done  
8 telling me that they're not proceeding under 510(b), it's  
9 not a subordination agreement.

10 MS. SOLOMON: Now they're not. Before they were.

11 THE COURT: Okay.

12 MS. SOLOMON: So they've reconsidered that  
13 position.

14 THE COURT: Okay.

15 MS. SOLOMON: So generally when a clause is an  
16 agreement and then it's subsequently is taken out and it in  
17 the course of contract negotiations or a formalized  
18 agreement from year to year I think that there's a strong  
19 suggestion that it no longer applies, and that a reasonable  
20 person looking at that clause would understand that. And I  
21 heard that there was no particular claimant --

22 THE COURT: So the reasonable person looking at it  
23 in this case are the claimants, which you're telling me  
24 understand bankruptcy law and they looked at those documents  
25 and they compared them year to year and they said, wow, this

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1 is great, I'm not -- I'm no longer subordinated in the event  
2 of a bankruptcy.

3 MS. SOLOMON: Well, I mean either they understood  
4 it or they didn't understand it, but --

5 THE COURT: Or they didn't have any --

6 MS. SOLOMON: -- I don't think you can have it  
7 both ways. So you mean they didn't understand it when it  
8 was in there but it was still enforceable against them? You  
9 know, so maybe there were some people --

10 THE COURT: But look, we just had -- we just had  
11 testimony --

12 MS. SOLOMON: Yeah.

13 THE COURT: -- not testimony, argument --

14 MS. SOLOMON: Right.

15 THE COURT: -- that had I'm expected to believe  
16 that somebody earning \$850,000 a year didn't really  
17 understand that that wasn't being paid all in cash.

18 So I think this whole concept of that you're  
19 trying to urge of what people understood and didn't  
20 understand, it's all being bandied back and forth to suit  
21 your particular argument at that particular moment. So we  
22 had no --

23 MS. SOLOMON: Well, what we're talking about here  
24 is the removal of the subordination whatever.

25 THE COURT: No, no, but we've had no testimony by

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1 anybody who said that that -- the removal of that provision  
2 then they relied on that to continue to be an employee at  
3 Lehman Brothers.

4 MS. SOLOMON: This is -- this is a matter of  
5 contract interpretation, and it's a well settled rule of  
6 contract interpretation that you look when you're  
7 determining what is a reasonable interpretation of the  
8 agreement is what would a reasonable person looking over  
9 this, a hypothetical reasonable person looking at these  
10 documents what would they understand that to mean?

11 THE COURT: Okay.

12 MS. SOLOMON: And the hypothetical reasonable  
13 employee comparing the agreements from '03 and '04 to the  
14 later years would understand that 510(b) was in there at an  
15 earlier point and then at a later point it was taken out.  
16 And gosh, could that actually mean that 510(b) does not  
17 apply? Perhaps so.

18 THE COURT: And gosh, could that actually mean  
19 that anybody -- anybody actually did that? And if they did  
20 the people in this room are having a hard time understanding  
21 what 510(b) means, do you think that somebody working at  
22 Lehman Brothers in the IT department had any idea? It's  
23 lawyer boilerplate. They wouldn't understand the 1997 trust  
24 agreement if they get it. There's completely contradictory  
25 testimony.

1           You're now telling me that these people didn't  
2 understand that they were getting stock instead of cash, but  
3 if they had looked at these very complicated plan documents  
4 they would have understood that their rights were being  
5 changed in the event of a bankruptcy.

6           MS. SOLOMON: Do you think they had a right to  
7 understand that? Isn't the purpose of the wage law, Your  
8 Honor? And let's turn to the wage laws just for a --

9           THE COURT: Quickly, please.

10          MS. SOLOMON: -- a few moments okay?

11          I've heard it bandied about here that, you know,  
12 these individuals were all sophisticated financially, but  
13 the fact of the matter is they're not lawyers, they're not  
14 sophisticated legally, and they don't understand the  
15 connotations of 510(b) of the Bankruptcy Code, and that is  
16 something that --

17          THE COURT: So now you're arguing against your own  
18 point.

19          MS. SOLOMON: No, I'm not, I'm not. I'm focusing  
20 on the wage laws for a moment, okay, Your Honor? And, you  
21 know, weren't they entitled to have a reasonable explanation  
22 from their employer when their employer were signing them up  
23 into the RSU plan, which you know, it's been told -- it's  
24 been described as a condition of their employment, weren't  
25 they entitled to know what the consequences of their

1 participation in the plan would be? And isn't that the --  
2 isn't that the underlying premise of the wage laws?

3 Because the wage laws are there because it's  
4 recognized that employees typically do not hire lawyers to  
5 pour over their employment agreements, and that's why the  
6 wage laws are there to protect them in the first instance,  
7 and that's exactly what did not happen in this case.

8 THE COURT: So Mr. Shotton, when he moved his  
9 family from England and signed up to make a million and a  
10 half dollars a year --

11 MS. SOLOMON: Whatever the amount was, Your Honor.

12 THE COURT: -- okay, gee, if he had only realized  
13 that he should talk to a lawyer. That's not what the  
14 testimony was. He understood -- not to pick on him --

15 MS. SOLOMON: Yeah.

16 THE COURT: -- but he understood that his  
17 compensation package was going to be comprised at the firm's  
18 discretion of cash and stock. He understood that.  
19 Ms. Krieger understood that. She understood that.

20 MS. SOLOMON: But do you think that they had a  
21 right to understand by virtue of their participation in the  
22 plan and nothing else that in the event of Lehman's  
23 bankruptcy their compensation would be automatically  
24 forfeited? Was that a right that they had?

25 I mean the wage laws -- you know there's a lot of

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1 wage law that I've gone over, Your Honor, wage law case law  
2 that deals with the enforceability of these types of  
3 agreements, and you know, there's newer case law, the Guiry  
4 decision has been cited to Your Honor.

5 THE COURT: Okay. So -- so you want a cause of  
6 action for the failure to -- the failure to describe the  
7 bankruptcy consequences of this.

8 MS. SOLOMON: That's a wage law claim.

9 THE COURT: It's a wage law claim.

10 MS. SOLOMON: Enforcement of their wage law  
11 rights. That's exactly what it is. And when Lehman failed  
12 to disclose the consequences of the bankruptcy -- of an  
13 event of bankruptcy upon these employees' compensation I  
14 construe it as -- as equivalent --

15 THE COURT: You know --

16 MS. SOLOMON: -- to the signing of a note, a fixed  
17 debt claim.

18 THE COURT: Well, you know what, this was a trial  
19 that's now concluding, and you could have gone out and you  
20 could have gone out and attempted to bring in an expert or  
21 attempted to bring in examples from other investment banks  
22 and RSU programs and demonstrate that, you know, in the  
23 medical field it's called standard of care --

24 MS. SOLOMON: Uh-huh.

25 THE COURT: -- that somehow Lehman and Lehman only

1 didn't do what it had to do, and that maybe they have to  
2 hold a session on the, you know, civil rights, maybe they  
3 have to hold a session on the Internal Revenue Code, maybe  
4 they have to hold a session on, you know, you pick it.

5 MS. SOLOMON: Well, I --

6 THE COURT: All -- everyone operates pursuant to  
7 applicable law, and what you're suggesting is that before  
8 you can become an employee anywhere you're going to have to  
9 -- the employer is going to have to sit down and go through  
10 and I guess make sure every single employee understands  
11 every single possible ramification of their employment. Is  
12 that -- that's your rule?

13 A No. Your Honor, not every single possible  
14 ramification, but the significant ramifications, yes, that  
15 is what I'm proposing to the Court.

16 And I think that counsel for Lehman themselves  
17 recognized that when on their bankruptcy blog they have  
18 written in discussing the Marsh case, Marsh versus  
19 Prudential, which is a Court of Appeals decision --

20 THE COURT: Wait, wait, wait, you're --

21 MS. SOLOMON: -- discussing the disclosure.

22 THE COURT: -- you're telling me something from  
23 the -- from what? From what blog?

24 MS. SOLOMON: From (indiscernible - 03:23:49)  
25 bankruptcy blog. It's cited in our brief.

1 THE COURT: Yes.

2 MS. SOLOMON: And it says:

3 "Marsh provides that plan participants should, as  
4 a condition to participation, sign a written authorization  
5 acknowledging that they were given notice of and understand  
6 the risks associated with participation in the plan."

7 That didn't occur here.

8 THE COURT: Was there -- so you're saying that  
9 that's -- that's the problem. See this is -- the argument  
10 changes --

11 MS. SOLOMON: No.

12 THE COURT: -- here like every seven minutes.

13 So now this -- the claim is that there was no  
14 written -- there was no written notice, that they don't have  
15 a piece of paper.

16 MS. SOLOMON: Well it wasn't explained orally and  
17 there was no -- and the argument all along has been that  
18 there were --

19 THE COURT: Right. Do you remember the testimony  
20 by Ms. Krieger --

21 MS. SOLOMON: -- there were written  
22 authorizations.

23 THE COURT: -- about the extensive sessions with  
24 HR and about how she was trained to then tell -- to help  
25 explain all of the compensation arrangements to her team?

1 MS. SOLOMON: Yeah, but not with regard to the  
2 consequences of bankruptcy. That's what I'm focusing on  
3 Your Honor, I wasn't going to any other issue, only what  
4 were the consequences of bankruptcy by Lehman with regard to  
5 the claimants' participation in the plan. That was not  
6 disclosed to them ever.

7 THE COURT: Okay.

8 MS. SOLOMON: And it is my position that it should  
9 have been disclosed, the RSU documents themselves advise  
10 claimants that they should consult with their tax advisors,  
11 but didn't --

12 THE COURT: And it should have said they should  
13 consult with their bankruptcy advisor.

14 MS. SOLOMON: Legal advisor perhaps because there  
15 were very serious legal consequences if you're --

16 THE COURT: That --

17 MS. SOLOMON: -- if Your Honor is going to rule  
18 that by virtue of their participation in the plan and  
19 nothing else they forfeit their right to compensation that  
20 they've earned.

21 THE COURT: Thank you.

22 MS. SOLOMON: Thank you.

23 THE COURT: Mr. Kaplan, if you would wrap up?

24 MR. KAPLAN: Yes, Your Honor.

25 Had the Neuberger clients walked into Lehman --

1 Neuberger claimants walked into Lehman on day one and been  
2 given an employment contract such as you've seen this  
3 morning I wouldn't be here, but the Neuberger claimants  
4 became Lehman employees because their firm was acquired by  
5 Lehman.

6 THE COURT: It doesn't -- Mr. Kaplan, it just  
7 doesn't matter. We went through this with -- with  
8 Mr. Ramallo at length and he very candidly testified that he  
9 understood at that moment in time that he had a choice to  
10 make and he made that choice, and it turned out to be a  
11 very, very lucrative choice.

12 MR. KAPLAN: No, he didn't have a choice, Your  
13 Honor.

14 THE COURT: Yes, he did, he had --

15 MR. KAPLAN: What he said was he had to stay at  
16 Neuberger and Lehman because he had no choice other than not  
17 to be an asset management.

18 THE COURT: I'll tell you something, okay, when  
19 you go around the country and you talk to, as I do, other  
20 judges who reside other Chapter 13 cases, all right, and one  
21 of the things that has to be considered is your ability to  
22 get a job, right? And those debtors who make \$17,000 a  
23 year, they get told that it's all well and good that you'd  
24 like to be X, that you'd like to be a banker, but you need  
25 to expand your search and you need to look for a job that

1 will pay back your debts.

2 So while as a human being I'm sympathetic to the  
3 desire of a person to continue to do what they like doing  
4 and build on what they've built up, all right, and I heard  
5 Mr. Ramallo, he started at \$60,000 and he built himself up,  
6 and that's great, and Ms. Stiefel started in Q Garden Queens  
7 and never imagined that she would get to where she is, and  
8 she liked it and it gave her satisfaction and she didn't  
9 want to give it up. I get that very much. But that's not  
10 the same as not having a choice. It's a difficult choice,  
11 it's a cost balance, it's a plus minus, and at that moment  
12 in time -- and I think it's not useful to talk about it in  
13 terms of going and sitting on a beach --

14 MR. KAPLAN: But it was.

15 THE COURT: No, it was not the same as going and  
16 sitting on the beach. It's deciding that you had a good  
17 thing, you don't want to have to continue to do it at this  
18 firm, you're angry at the acquisition, you wish it weren't  
19 happening, you're angry that you're powerless to have it be  
20 something else, you don't have to go sit on the beach.

21 You could go for the period of time that you are  
22 restricted, and as Mr. Miller brought out it was not a  
23 thousand percent restriction, although I believe it was  
24 pretty restrictive, you could have gone and taken the money  
25 that you had saved up and taken the money in the case of

1 Ms. Stiefel that you got for your founder shares and you  
2 could have done something else. And then after the end of  
3 the three years you could go and you could start over and  
4 you could send your client list a letter that said, hey, I'm  
5 back. In fact people do that all the time when they have  
6 other life events, when they take a maternity leave, when  
7 they have other things that they want to do, they take a  
8 different path in the road and they come back.

9 It's a choice. It's a choice that they simply did  
10 not want to make. But then they did make it and in fact it  
11 turned out to a lucrative choice, because they made a lot of  
12 money, and in fact they turned out to be among the lucky  
13 ones because Neuberger went into Lehman and it came out of  
14 Lehman, and they got to get back what they loved.

15 So in my book that's not duress, that's not  
16 handcuffs, that's not we had no choice. That's we made a  
17 choice, it wasn't perfect, but we made a choice.

18 MR. KAPLAN: I don't know if it pays for me to  
19 continue, but I will.

20 You know, if we were in the District of  
21 Massachusetts where the law is that restrictive covenants,  
22 every time there's a material change of employment status  
23 the restrictive covenant falls away and there has to be a  
24 new restrictive covenant negotiated this would be an easy  
25 case and I wouldn't be here. Because these people who had

1       these three-year restrictive covenants or the one-year  
2       restrictive covenants --

3                 THE COURT: That they --

4                 MR. KAPLAN: -- that they had from Neuberger --

5                 THE COURT: Yes, that they voluntarily entered  
6       into. They chose --

7                 MR. KAPLAN: At Neuberger.

8                 THE COURT: At Neuberger.

9                 MR. KAPLAN: But when there is a material change  
10      in terms of their employment with the RSU program they then  
11      did not have a choice because they were tied by the  
12      Neuberger restrictive covenants going forward, and that's  
13      why they didn't -- they didn't agree under the -- under the  
14      words of Med Diversified the Seventh Circuit said that the  
15      man trade his -- agree to exchange employment claims for his  
16      shares. Bargain not for cash but to become a shareholder.  
17      They didn't bargain for anything.

18                 THE COURT: Yes they did. They decided to go  
19      along instead of not. They just --

20                 MR. KAPLAN: They didn't have a choice whether to  
21      go along or not. You're not --

22                 THE COURT: You and I have a different definition  
23      of choice.

24                 MR. KAPLAN: Absolutely.

25                 THE COURT: They had a choice. It was a plus

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1 minus cost benefit hard choice. They had a choice and they  
2 made it. Nobody drove up to Neuberger Berman with a truck  
3 and threw them in the back and put a padlock on it and drove  
4 them over to 745 7th Avenue and made go in there and work  
5 for Lehman Brothers and chain them to their desk. That's  
6 not what happened.

7 MR. KAPLAN: That's true.

8 THE COURT: They chose not to take a garden leave.

9 MR. KAPLAN: One of the conditions of the merger  
10 or the acquisition was that they remain at 40th Street and  
11 Third Avenue as part -- as a separate entity, but that's  
12 beside the point.

13 THE COURT: That is a smart-aleck remark.

14 MR. KAPLAN: The point, Your Honor, is --

15 THE COURT: Most attorneys would say I'm sorry,  
16 Your Honor. That's a smart-aleck response, and at ten  
17 minutes after 2:00 I have zero patience for smart-aleck  
18 responses.

19 MR. KAPLAN: I apologize, Your Honor.

20 The point, Your Honor, is this, that so they have  
21 a choice as you said to go out and do something else is in  
22 reality not a choice. It is give up your career, give up  
23 your livelihood, give up your profession and go do something  
24 else for a year or 3 years or 18 months and maybe at the end  
25 of that period you can reconstruct your business. That is

1 not a choice, that is not a willing decision, that is not  
2 agreed.

3 THE COURT: And so because the management of  
4 Neuberger Berman decided to sell themselves at Lehman -- to  
5 Lehman that now Lehman should give these people the cash  
6 instead of the stock that was --

7 MR. KAPLAN: Deducted from their payrolls.

8 THE COURT: It was never deducted from their --

9 MR. KAPLAN: It was. That's what the 2008  
10 document shows, that what was done here was the cash was  
11 deducted from their monthly paychecks and placed into a  
12 trust account --

13 THE COURT: Where's the -- where -- you have this  
14 account statement for that trust account?

15 MR. KAPLAN: I don't have the account statement, I  
16 have the statement that says it was placed in trust with --  
17 into a trust with Wells Fargo, and as I understand it at the  
18 end of the year that money would be given to LBHI to  
19 purchase the RSUS.

20 THE COURT: Do you have -- well you had discovery,  
21 did you get the trust document that shows the cash balance  
22 in that trust account with all their names on it?

23 MR. KAPLAN: No.

24 THE COURT: Did you get that? No. Because you've  
25 taken a document which was -- which was inappropriately

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1 redacted to begin with and you've used that as evidence that  
2 all along there was this cash that was deducted and was  
3 being put into an account. There's been no evidence of  
4 that. There's no evidence of that.

5 MR. KAPLAN: There's been testimony that they were  
6 paid on a -- on a production compensation basis that they  
7 would get paid some in cash and some would be withheld,  
8 deferred, held back, and then at the end of the year they  
9 would get a statement which would show that amount of the  
10 withheld amount being placed into the RSUs, and that  
11 together with the cash that was available at 2008 because it  
12 was being held by Neuberger and not by Lehman from a  
13 November 17th memo that predates the date of the agreement  
14 for a management buy out, which Mr. Miller conceded was on  
15 Thanksgiving weekend, shows that there was cash withheld  
16 from these people by Neuberger, which was a separate  
17 subsidiary, and at the end of the year when there was time  
18 to give it over pursuant to the equity award program it was  
19 given over. But there's no question that these people had  
20 their cash withheld, their specific --

21 THE COURT: Where's the account? Show me the  
22 account statement. Where is it?

23 MR. KAPLAN: The money went to the RSU program --

24 THE COURT: The money went --

25 MR. KAPLAN: -- and is reflected in the RSU

1 program.

2 THE COURT: The money went to the RSU program.

3 Okay, so it doesn't exist. There's no account out there  
4 that says cash held in trust for Neuberger Berman employees.

5 MR. KAPLAN: Not at the moment because it was  
6 distributed in 2008 and the prior years went -- went to the  
7 RSU program. But that doesn't mean that they didn't have  
8 their commissions withheld and that doesn't mean that under  
9 the -- under the New York Labor Law they're entitled to  
10 their commissions.

11 The fact that -- it just doesn't -- it doesn't  
12 make sense that all of a sudden this vanishes because of  
13 what happened here. They had commissions withheld --

14 THE COURT: So why -- is every Neuberger Berman  
15 employee in the same boat?

16 MR. KAPLAN: Is every Neuberger employee?

17 THE COURT: Yeah.

18 MR. KAPLAN: No, there are Neuberger Berman  
19 employees including the one that I represented who  
20 unfortunately defaulted when --

21 THE COURT: No, how many --

22 MR. KAPLAN: -- they were served with this notice.

23 THE COURT: -- employees are there at Neuberger  
24 Berman who went -- who went back at the time of the  
25 demerger? How many were there?

1 MR. KAPLAN: I'm not sure exactly, but I would  
2 assume --

3 THE COURT: Hundreds?

4 MR. KAPLAN: Hundreds or thousands, yes.

5 THE COURT: Okay. And they probably a lot of them  
6 had RSUs, right?

7 MR. KAPLAN: I assume a lot of them did, yes.

8 THE COURT: Okay. And how many do you represent?

9 MR. KAPLAN: Ten.

10 THE COURT: Okay, so the rest of them are just not  
11 on their game? They just -- they just don't need the money?

12 MR. KAPLAN: No, one of them I know defaulted and  
13 when I tried to open the default I was -- Lehman vigorously  
14 opposed by motion.

15 So I -- that's -- I don't represent Neuberger  
16 Berman, I represent ten clients and those ten clients  
17 retained me to -- and Mr. Kramer retained me to represent  
18 him as another member of the Strauss Group, but he had been  
19 served with an earlier objection and had defaulted.

20 You know, I can't -- there was one other fellow  
21 here who was a Neuberger Berman wealth advisor who has a  
22 claim, we don't represent him. I don't know what his  
23 circumstances are.

24 All I know is these people were all bound by  
25 restrictive covenants going in and it is our view that they

1 had absolutely no choice but to continue their employment.

2 THE COURT: Okay, so that's Your -- so that's the  
3 question you want me to rule on.

4 MR. KAPLAN: That's correct.

5 THE COURT: Whether or not they had any choice.

6 MR. KAPLAN: Yes.

7 THE COURT: Okay. Thank you.

8 Mr. Miller, did you want some rebuttal time before  
9 everybody passes out?

10 MR. MILLER: Your Honor, unless you have some  
11 questions for us we believe the issues have been fully  
12 developed in the Court's questions and we do not seek any  
13 rebuttal.

14 THE COURT: Okay. All right, very good.

15 Let's take a few minutes to talk about post-trial  
16 submissions, which I think, you know, I really don't want to  
17 be voluminous.

18 So, Mr. Miller, did you have -- have you had a  
19 chance to talk to your adversaries about -- about how we  
20 should do this?

21 MR. MILLER: Well, yes, Your Honor, I'll come  
22 around to the microphone --

23 THE COURT: Okay.

24 MR. MILLER: -- and there have been some other  
25 discussions.

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1                 First of all we I think need some clarification as  
2         a group as to whether the Court prefers proposed findings of  
3         facts and conclusions of law or some other kind of briefing  
4         or both.

5                 THE COURT: I don't want both, but I'd like to  
6         give you your preference. I mean what I typically do after  
7         a very lengthy trial is findings of fact, non-advocacy  
8         pieces. Very straight up the middle findings of fact with  
9         record citations both to transcripts, you know, page line of  
10        testimony, and documents, and then -- and this is where the  
11        optionality comes in -- most of the time in a large trial I  
12        have a post-trial brief that then refers to the findings of  
13        fact.

14                 Alternatively if it would be easier for you to  
15         just do findings of fact and conclusions of law that's fine  
16         too. I know you've all put a lot of work into this and I'm  
17         not looking to unduly burden you, but it assists us in  
18         preparing a decision, you know, to have -- to have  
19         something, and I think, you know, we would -- we would want  
20         it in searchable PDF form and Word form, you know, numbered  
21         paragraphs, I don't know, within X period of time and we  
22         agree to X length.

23                 You know, I could be more definitive but I like to  
24         give the -- you know, counsel the choice of how they'd like  
25         to -- they'd like to do it.

1                   MR. MILLER: Well, Your Honor, first of all I  
2 think we had discussed the fact that everyone feels that  
3 whatever time limit we set it probably should run from the  
4 availability of the transcripts --

5                   THE COURT: Yes.

6                   MR. MILLER: -- since people don't know how long  
7 that's going to be exactly and --

8                   THE COURT: Right.

9                   MR. MILLER: -- we really can't start doing --

10                  THE COURT: Sure.

11                  MR. MILLER: -- some of these things in detail.

12                  THE COURT: And as I've -- and as I've told you  
13 I've got a lot on my plate, so as a realistic matter I'm  
14 really not going to get to this until June, so that is  
15 intended to just take a little bit of the pressure off of  
16 you.

17                  MR. MILLER: Yes, Your Honor. And as far -- I  
18 think there's also a feeling that each group would like some  
19 opportunity after whatever the submission is to have some  
20 objections or to express their views on the other parties'  
21 submissions.

22                  THE COURT: Okay.

23                  MR. MILLER: So there is some desire for a follow  
24 up.

25                  As far as LBHI is concerned we don't feel a need

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1 for additional briefing on the issues, we think our briefs  
2 already cover our issues.

3 THE COURT: Okay.

4 MR. MILLER: But if the Court for its convenience  
5 would like findings of fact and some post-trial briefing or  
6 conclusions of law we're happy to do that and to exchange  
7 that simultaneously and then have a response.

8 One point the Court had said that you would like  
9 to have the claimants explain how the factual evidence which  
10 they have primarily presented that's new --

11 THE COURT: Right, that's the big --

12 MR. MILLER: -- what it was for --

13 THE COURT: That's the big one.

14 MR. MILLER: All right.

15 THE COURT: I mean that's kind of the big one for  
16 me.

17 MR. MILLER: Well if you'd like to have that in  
18 the form of a post-trial brief then frankly LBHI would be  
19 happy to sit that out since we think we've already done that  
20 and then we'll respond to that, and -- but again, that's --  
21 that can be in the format of findings of fact and  
22 conclusions of law or not, so --

23 THE COURT: I mean I think that what makes the  
24 most sense is for the claimants to go first and to give me  
25 findings of fact that you believe you showed. I mean a lot

1 of what we've been arguing about this morning has to do with  
2 what you believe you maintain you've shown as facts.

3 So I think that that would be a useful thing to do  
4 for you to give me a set of proposed findings with record  
5 citations to the transcript and the documents and a brief,  
6 you know, post-trial submission that says why you win, you  
7 know --

8 MS. SOLOMON: And so you're talking about a  
9 separate brief, Your Honor?

10 THE COURT: Well you're going to do findings of  
11 fact and then, you know, based on those -- and it can be --  
12 it can be very brief. I mean it can basically be a redo of  
13 your initial submission, but with findings of fact.

14 So I just need some guidance to understand what it  
15 is that you think that you've proven and why you think that  
16 means you win. It's just as simple as that.

17 So do you want more definition around it than  
18 that?

19 MS. SOLOMON: No, I think that's sufficient.

20 THE COURT: But I'd like it to be coordinated, I  
21 don't want to have multi-overlapping sets of papers.

22 MR. KAPLAN: No, I was just going to ask --

23 THE COURT: Expect for -- expect for Neuberger.

24 MR. KAPLAN: Yeah, I was going ask if I could --

25 THE COURT: Yeah.

1 MR. KAPLAN: Yeah.

2 THE COURT: I mean -- no, but among the other  
3 claimants.

4 MR. KAPLAN: Yeah.

5 MS. SOLOMON: So you're asking for one joint  
6 submission?

7 THE COURT: I am, yeah.

8 MS. SOLOMON: Okay.

9 THE COURT: Because you know, I think we've all  
10 agreed now that as it turns out there's no distinction  
11 between the RSUs and the CSAs and --

12 MS. SOLOMON: Your Honor, I don't agree with that  
13 actually.

14 THE COURT: See that -- this is the problem,  
15 somebody said that and now somebody else disagrees with it.

16 MS. SOLOMON: It's in our exhibit list and LBHI  
17 does not have any objection to it. I understand that  
18 they're -- with regard to the voting rights and I apologize  
19 if I didn't get to this issue --

20 THE COURT: Well somebody, one of your colleagues  
21 -- one of your co-counsel --

22 MR. BOYAJIAN: I did mention that, Your Honor.

23 MS. SOLOMON: And yes, but --

24 THE COURT: No, but somebody else said that it  
25 turns out there's no difference between the RSUs and the

1 CSAs.

2 MS. SOLOMON: Yeah, but that's not correct,  
3 because as to the voting rights the voting rights there is a  
4 distinction and CSA holders did not have voting rights if  
5 they resided in certain geographics locations, and that's  
6 set forth clearly in the RSU trust agreement. That's -- as  
7 far as I know the only distinction, but that's a significant  
8 distinction.

9 THE COURT: Okay. Why don't we say 30 days after  
10 the transcript is available there's a findings of fact and  
11 post-trial brief and/or conclusions of law are submitted.

12 MS. SOLOMON: Could we ask for a little more time,  
13 Your Honor?

14 MR. KAPLAN: Can we ask for 60 days or something  
15 like that?

16 MR. MILLER: It's fine with LBHI for them to take  
17 whatever time they need, Your Honor.

18 THE COURT: Well, you know, I just want to say  
19 though that there was definitely a sense from the folks that  
20 came in that this was a war of attrition that was being  
21 orchestrated by LBHI and the lawyers to wear people down.

22 So what I want to make very clear and I'm going to  
23 say it out loud on the record is that I'm happy to abide by  
24 that request, but if there's a reaction when you inform your  
25 clients that this is yet another example of this being

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1       dragged out that I want to say out loud that at your request  
2       we're going to go out 60 days, there's not going to be a  
3       Lehman distribution in that period of time so nobody's  
4       economic rights are prejudiced, and that this is not any  
5       indication of, you know, furtherance of any purpose in  
6       delaying the adjudication of these cases. In fact from my  
7       perspective, because of everything that I have backed up on  
8       my plate, it's fine with me because I'm just not going get  
9       to it until June in any event. So --

10                  MS. SOLOMON: Of course not, Your Honor, and --

11                  THE COURT: All right? I'm not suggesting that  
12       you would tell them that, but there was definitely some  
13       feeling that this has all been about stringing people along  
14       and getting people to fall by the wayside through a war of  
15       attrition and --

16                  MS. SOLOMON: I don't think it was suggested that  
17       it was coming from the Court. Perhaps from our adversary's  
18       counsel, but you know, and if I were doing -- if I were  
19       doing this alone obviously 30 days would be sufficient,  
20       but --

21                  THE COURT: I understand, you want --

22                  MS. SOLOMON: -- it's a joint --

23                  THE COURT: -- you want to be -- that's --

24                  MS. SOLOMON: -- and there's -- everybody has --

25                  THE COURT: -- it's absolutely -- it's absolutely

1 fine with me.

2 So then how many days thereafter would you like,  
3 Mr. Miller?

4 MR. MILLER: Your Honor, if we could have 30 days  
5 after that --

6 THE COURT: Sure.

7 MR. MILLER: -- to provide a response --

8 THE COURT: Sure.

9 MR. MILLER: -- which will include our own  
10 findings of fact I think that would probably do it.

11 THE COURT: Okay. So we're going to want them in  
12 numbered paragraphs with record citations, eventually  
13 they'll be filed on the docket and you'll provide PDF and  
14 Word documents to us, and then once we have both sets we'll  
15 -- we'll do our work. All right?

16 MR. KAPLAN: Three sets.

17 THE COURT: Three sets.

18 MR. KAPLAN: Thank you, Your Honor.

19 THE COURT: Okay. Spirited debate, nothing  
20 personal, all right?

21 MR. KAPLAN: And I apologize again, Your Honor.

22 THE COURT: It's okay.

23 All right, thank you all very much.

24 I do hope that all the claimants understand that  
25 as evidenced by the fact that we've taken three days that

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1 the Court is taking this very seriously and all the parties  
2 certainly are.

3 MS. SOLOMON: Thank you, Your Honor.

4 THE COURT: Yes, Mr. Miller?

5 MR. MILLER: Your Honor, I believe we're down to  
6 one question on one exhibit, and if we can take care of that  
7 now maybe --

8 THE COURT: Sure.

9 MR. MILLER: -- we won't have to reconvene for  
10 that purpose, and Ms. Brady is going handle that for us.

11 THE COURT: Yes, Ms. Brady.

12 MS. BRADY: Your Honor --

13 THE COURT: Want to come up -- come up to the  
14 microphone. You know I've been on trial for a month? So  
15 this is me at low -- this is me at low energy. Go ahead.

16 MS. BRADY: Your Honor, we -- Teresa Brady for the  
17 estate.

18 THE COURT: Yes.

19 MS. BRADY: The parties just have a dispute over  
20 one exhibit.

21 THE COURT: Okay, which one?

22 MS. BRADY: CLX071.

23 THE COURT: Okay, it's a memo from Mr. Palizi  
24 (ph).

25 MS. BRADY: Yes. This is an email from Mr. Palizi

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1 to Chris Tanninga (ph) at Lehman Brothers. The cover -- and  
2 it attaches a nearly 50-page PowerPoint presentation. And  
3 the cover email indicates that these were some slides that  
4 were being provided to Mr. Dick Fold (ph) in preparation for  
5 annual shareholder meeting.

6 THE COURT: Okay.

7 MS. BRADY: And there hasn't been any testimony  
8 regarding this document at trial and that's why we object to  
9 it being entered as evidence.

10 It is cited in the claimants' brief, but we don't  
11 have any testimony about the background of the document, you  
12 know, there's a lot of information in these 50 pages, so we  
13 object to it being entered as evidence.

14 THE COURT: All right. Ms. Solomon?

15 MS. SOLOMON: Your Honor, I was actually  
16 interested in one single page from this document, and that  
17 is 7557, and there's -- there's been a lot of talk back and  
18 forth about the trust and what it meant, and the RSU trust  
19 and when it got funded and when, you know, holders of RSUs  
20 and CSAs were entitled to vote their RSUs. And this is just  
21 an example --

22 THE COURT: Which page again, 7 --

23 MS. SOLOMON: This is 7557, Your Honor.

24 THE COURT: Yeah.

25 MS. SOLOMON: And this is just an example, it

1 shows as of 11/05, it says, RSU trust implications and it  
2 says, "Sixty million RSUs outstanding, 35 million in trust."

3 To give the Court just a, you know, as an example  
4 of at that particular point in time just a little more than  
5 half of the outstanding RSUs were in the trust and that at  
6 that particular point in time it was only possible at most  
7 for half of the holders of those RSUs to potentially have  
8 voting rights if they did under the applicable trust  
9 agreement and the other rules that would -- that apply.

10 MS. BRADY: Your Honor, LBHI has never taken the  
11 position that there is a one to one ratio in the shares  
12 available in the trust and the outstanding RSUs.

13 THE COURT: Right.

14 MS. BRADY: And in fact what the trust -- the  
15 proxy statement shows is that there was a proportional  
16 share, and the votes --

17 THE COURT: Right. And Mr. Miller -- Mr. Miller  
18 made that -- argued exactly that during the opening  
19 argument. He never argued that it was one to one. He  
20 specifically said that it -- that there was voting, but that  
21 it was not -- there was not a one to one correspondence  
22 between RSUs outstanding and shares that were in the trust.

23 MS. SOLOMON: But the proportional voting goes to  
24 a different issue. That the proportional voting goes to the  
25 issue of after holders are given a right to vote, depending

1 upon how many vote, for instance, if one person does not  
2 vote their vote will be counted depending upon the  
3 proportion of votes that are cast by RSU holders to the  
4 total outstanding.

5 THE COURT: Well --

6 MS. SOLOMON: That's the ratio. That's what the  
7 proportional voting --

8 THE COURT: But to -- I mean to take a -- to take  
9 a page from a deck of last year's slides that are going to  
10 Dick Fold that we don't know were they ever used, were they  
11 changed, who wrote them, it -- this is not a document that  
12 was publicly filed, that -- I mean I don't know anything  
13 about this. It's just a random statement on a page.

14 MS. SOLOMON: It's a detailed analysis of the  
15 various implications of the RSUs, and in this instance the  
16 trust document itself prepared by Lehman employees  
17 themselves.

18 THE COURT: I don't know who -- I don't know who  
19 Mr. Palizi is, who Mr. Tanninga is, I don't know if there was  
20 a reply back that said, yeah, we're going to fix these,  
21 they're last years, they were wrong.

22 MS. SOLOMON: Your Honor, they stipulated to the  
23 authenticity of this document already.

24 THE COURT: But -- yes, but all that authenticity  
25 means is that in fact this is a document that was send from

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1 Mr. Palizi to Mr. Tanninga that it's not a fake. It doesn't  
2 help me --

3 MS. SOLOMON: I mean it's certainly relevant to  
4 the issues before the Court. So I don't think anybody is  
5 arguing about that. And again, it's only as of this one  
6 particular point in time to give the Court an example --

7 THE COURT: But --

8 MS. SOLOMON: -- an idea --

9 THE COURT: -- all that it -- all that you can  
10 tell me is that it says this on this page. You don't have a  
11 witness here to explain it, give it context, state whether  
12 it was accurate, state whether it was updated. It's just --  
13 I mean but for the fact that it's -- it's a Lehman document  
14 it would be hearsay, but there's a hearsay exception because  
15 it's of a party.

16 But look, I mean I'll let it in, but you have no  
17 -- but there's no -- there's no foundation, there's no  
18 explanation, there's no context, there's no indication  
19 whether it's right, whether it's wrong, whether it was  
20 changed, just that it says this on the page.

21 Mr. Miller?

22 MR. MILLER: Just to clarify, Your Honor, and I'm  
23 not trying to question your ruling, I want to understand.  
24 If you say you'll let it in can we limit it to this page as  
25 opposed to the other --

1 THE COURT: Yes, this --

2 MR. MILLER: -- 43 pages --

3 THE COURT: -- this page.

4 MS. SOLOMON: That's fine.

5 MR. MILLER: -- of cryptic --

6 THE COURT: No --

7 MS. SOLOMON: I have no issue with that.

8 THE COURT: Yeah. I mean you -- so but the  
9 argument is going to be limited to that on this last year's  
10 deck that was provided on this date these are what the  
11 numbers on this page said.

12 MS. SOLOMON: Right, and I would just request that  
13 the covering -- you know, the covering email and if there's  
14 a cover page also be included.

15 THE COURT: Okay.

16 MR. MILLER: Certainly reasonable, Your Honor, for  
17 context. Our concern was since we didn't know exactly what  
18 it was going to be used for, but all those pages of who  
19 knows what inscriptive PowerPoint talk --

20 THE COURT: Right.

21 MR. MILLER: -- being in the record, that's what  
22 our objection was.

23 THE COURT: Right. I mean, you know, once again  
24 -- well, I won't go into it.

25 So we're going limit it to that -- that one page

1 with the cover page and the transmittal email.

2 Yes?

3 MR. KAPLAN: Your Honor, on another issue. In  
4 connection with the findings of fact when we refer to  
5 exhibits when they're multi-page exhibits I assume you would  
6 like the page --

7 THE COURT: Yes. Yes.

8 MR. KAPLAN: Some of them we can't do more than  
9 that, right?

10 THE COURT: Right.

11 MR. KAPLAN: We can put in if there's a heading on  
12 it or something, but -- right.

13 THE COURT: Right.

14 MR. KAPLAN: Okay.

15 THE COURT: Right. I mean the point is that  
16 otherwise --

17 MR. KAPLAN: To try and point you to --

18 THE COURT: -- we have to -- we have to spend  
19 an --

20 MR. KAPLAN: Right.

21 THE COURT: -- enormous amount of time searching  
22 for the record cites --

23 MR. KAPLAN: Right.

24 THE COURT: -- and that -- that just creates a lot  
25 of --

1 MR. KAPLAN: So when we give record cites to  
2 exhibits we should try and particularize.

3 THE COURT: The more particular the better, yes.

4 MR. KAPLAN: Absolutely.

5 THE COURT: So did we ever get the final set of  
6 exhibits or are you going to just submit that to me later?

7 MS. BRADY: Your Honor, I have a list right here  
8 if that would be helpful of LBHI's exhibits that the  
9 claimants do not object to.

10 THE COURT: Okay. What would be helpful is if you  
11 just sent -- sent -- each of you sent chambers an email that  
12 just says here are the exhibits that are by agreement of the  
13 parties constitute the record.

14 MS. SOLOMON: And it's just an exhibit list  
15 obviously.

16 THE COURT: Just a list.

17 MS. SOLOMON: Yeah.

18 MR. MILLER: And obviously that'll be served on  
19 each side so we can check and make sure we all have the same  
20 ones.

21 THE COURT: Yes. You should all share the  
22 document numbers and then someone should send me one email  
23 that just says here are the respective parties' exhibits  
24 that by agreement are -- are the -- constitute the record.  
25 Okay?

1 MR. MILLER: Certainly, Your Honor.

2 MS. SOLOMON: Thank you, Your Honor.

3 THE COURT: Okay, thank you everybody. Thank you  
4 for your patience and your endurance.

5 MR. MILLER: And thank you for your time, Your  
6 Honor.

7 MR. KAPLAN: Thank you, Your Honor.

8 THE COURT: Sure.

9 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

10 (Proceedings concluded at 2:23 PM)

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1 C E R T I F I C A T I O N

2 I, Sheila G. Orms and Dawn South, certify that the  
3 foregoing is a correct transcript from the official  
4 electronic sound recording of the proceedings in the above-  
5 entitled matter.

6

7

8

9 Signature of Approved Transcriber

10

11

12

13 AAERT Certified Electronic Transcriber CET\*\*D-408

14

15 Veritext

16 330 Old Country Road

17 Suite 300

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19 Date: April 7, 2014

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